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CASE NO.: 02 110 MAY 23 2002

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 2002

CHARLES E. COLLINS, III

Petitioner,

- against -

SOL GREENBERG
JAMES NIXON
CHRISTOPHER D. HORN

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNTITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the defendants entitled to judicial immunity when they acted in violation of the law and in clear absence of all jurisdiction as there is state statute and/or case law that expressly deprived them of any authority to prosecute the Petitioner?

2. Did the Appellant submit a waiver of immunity to the grand jury as required by CPL §190.50(5)(b)?

3. Did the Appellant sign a valid waiver of immunity that complies with CPL §190.45?

4. Is the Appellant entitled to transactional immunity after he appeared and gave testimony before the grand jury without submitting his alleged waiver of immunity to the grand jury and without signing a valid waiver of immunity as he did not have counsel present and there was no judicial inquiry done by a judge?

5. Can a 1983 action continue even though the Appellant's habeas corpus petition has been denied for failure to exhaust state remedies?

LIST OF ALL PARTIES

I certify that the following comprise all interested persons known to the Petitioner:

Petitioner: Charles E. Collins, III - Pro se
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Respondents: Sol Greenberg
James Nixon
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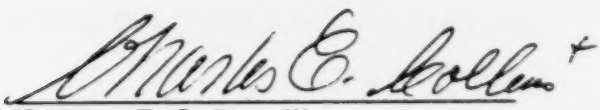

Charles E. Collins, III
Petitioner - Pro se

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STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is sought from a final Order of the United States Court of Appeals, Second Circuit, issued February 22, 2002 (01-7739) and is herein filed within the required ninety (90) day period.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. Art. VI, Section 2.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.-,

U.S. CONST. Amendment Five

No person shall be held to answer for a capital, or otherwise infamous Crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amendment Six.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. Amendment Fourteen.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. Section 1985.

Conspiracy to interfere with civil rights.

(2) If two or more persons in any state or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing,

or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State of Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, of one or more persons engage therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF SUBJECT MATTER AND JURISDICTION OF DISTRICT COURT

The Federal District Court had subject matter jurisdiction pursuant to 28 U.S.C.A. Section 1343 (3) as this is a civil rights action brought under Title 42 U.S.C.A. Section 1983. The Petitioner documented in his complaint that the respondents were acting under color of state law when they prosecuted the Petitioner in clear absence of all jurisdiction.

STATEMENT OF CASE

The Petitioner filed his complaint against the above named respondents on September 5, 2000 documenting that the respondents were acting under color of state law, that they deprived the Petitioner of his constitutional right to counsel and his constitutional rights to due process and equal protection of the law. He further argued that the respondents did not have judicial immunity as they acted in complete absence of all jurisdiction as there is state statute and case law that expressly deprived them of any authority to prosecute the Petitioner and to have him imprisoned.

The Petitioner was arrested and arraigned on January 26, 1998 on the charge of criminal mischief in the second degree, a class D felony (Exhibit 6 - Transcript).

The transcript documents that the Petitioner was not represented by counsel; that there was no judicial inquiry; that he was not informed of the information required by New York CPL §180.10 (1), (2), (3), (4) and (5); and he was not informed of the advantages and disadvantages of self-representation in order for him to waive his right to counsel.

That the Petitioner appeared again on February 3, 1998 (Exhibit 7 - Transcript) and the matter was transferred to the county court for grand jury action.

That on April 28, 1998 the Petitioner appeared before the grand jury to testify in this matter (Exhibit 8 - Transcript). The transcript documents that the Petitioner did not have counsel present and that there was no judicial inquiry done when respondent Horn allegedly had him sign a waiver of immunity before he testified and that respondent Horn allowed Petitioner to testify without submitting the waiver of immunity to the grand jury.

That on April 28, 1998 the Petitioner was indicted on the criminal mischief charge.

That on May 6, 1998 the Petitioner filed a Notice of Motion to Dismiss the Indictment pursuant to CPL 210.20.

The Petitioner was then arraigned on May 8, 1998 on the criminal mischief charge.

The Petitioner on May 11, 1998 filed a Supplemental Affidavit dated May 11, 1998 (Exhibit 9) documenting that he was entitled to transactional immunity as he did not have counsel present and there was no judicial inquiry when he allegedly waived his right to counsel and/or immunity when he signed an alleged waiver of immunity and that he did not submit the alleged waiver of immunity to the grand jury as required in order to waive his right to immunity.

That on February 3, 1999 and March 3, 1999 a hearing was held concerning the Petitioner's Motion above. respondent Horn informed the court that he did not have the waiver of immunity and that the last time he saw it, the waiver was in Petitioner's possession (Exhibit 11 - Page 3).

That the Petitioner's trial began on or about December 14, 1999 and ended on December 23, 1999 when he was found guilty of criminal mischief in the second degree. Petitioner was then incarcerated and was subsequently sentenced to 1 1/3 to 4 years in jail as documented by the certificate of conviction.

POINT ONE

THE RESPONDENTS DO NOT HAVE JUDICIAL IMMUNITY FOR THEIR ACTIONS IN PROSECUTING THE PETITIONER AFTER HIS GRAND JURY APPEARANCE ON APRIL 28, 1998

The Federal District Court and the Federal Court of Appeals both took the position that the respondent's have immunity for their actions as they are prosecutors. They did not address the issue of whether the respondent were acting in violation of the law that deprived them of jurisdiction to prosecute the petitioner after he appeared before the grand jury without submitting and without legally waiving his right to counsel as required by law.

The Question is can the respondents lose their prosecutorial immunity from suit where they violate a defendant's right to immunity from prosecution?

It is the Petitioner's position that the respondents acted in clear absence of all jurisdiction when they continued to prosecute the Petitioner after he appeared before the grand jury on April 28, 1998 without signing a valid waiver of immunity and without submitting a waiver of immunity to the grand jury. At that point, the respondents lost all authority to continue to prosecute the Petitioner and have him imprisoned on December 23, 1999.

When a judge knows he lacks jurisdiction, or acts in the face of clearly valid state statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost, see Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980); Mills v. Killebrew, 765 F.2d 69 (6th Cir.).

Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980)

But when a judge knows that he lacks jurisdiction, or acts on the face of clearly valid state statutes or case law expressly depriving him of jurisdiction,

> *judicial immunity is lost.* See Bradley v. Fisher, 80 U.S. (13 wall.) at 351 ("when the want of jurisdiction is known to the judge, no excuse is permissible"), Turner v. Raynes, 611 F.2d 92, 95 (5th Cir. 1980) (Stump is consistent with the view that "*a clearly inordinate exercise of unconferred jurisdiction by a judge--one so crass as to establish that he embarked on it either knowingly or recklessly--subjects him to personal liability*").

Here we have valid state statutes and case law expressly depriving the respondents of any authority to prosecute the Petitioner after he appeared before the grand jury without signing a valid waiver of immunity and without submitting a waiver of immunity to the grand jury. As such, the respondents acted in complete absence of all jurisdiction and are not immune from civil liability for those acts.

Wright v. City of Reno, 533 F.Supp. 58 (D.Nev., 1981)

> This is a quasi-judicial immunity. It requires that the prosecutor's allegedly wrongful acts have been committed in the performance of an integral part of the judicial process; *as long as the district attorney has acted within that scope, or is authorized by law to do the act complained of*, he is immune from civil liability for those acts. Sykes v. State of California (Dept. of Motor Vehicles), 497 F.2d 197 (9th Cir. 1974); Marlowe v. Coakley, 404 F.2d 75 (9th Cir. 1968) Robichaud v. Ronan, 351 F.2d 533, 536 (9th Cir. 1965)

Moore v. Dormin, 173 Misc.2d 836, 662 N.Y.S.2d 239 (1997)

> In determining the issue of prosecutorial immunity, the Court considers whether the act complained of was within the scope of the prosecutor's delegated discretion and whether the position entails making decisions of a judicial nature (Arteaga v. State of New York, 72 N.Y.2d 212, 216, 532 N.Y.S.2d 57, 527 N.E.2d 1194 [1988]). A prosecutor, as a quasi- judicial officer, is absolutely immune from damages for state law claims for official

acts performed in the investigation or prosecution of criminal charges (Rodrigues v. City of New York, 193 A.D.2d 79, 87, 602 N.Y.S.2d 337 [1st Dept. 1993]). A prosecutor is not absolutely immune, however, when knowingly acting in violation of law (Id. at 85-87, 602 N.Y.S.2d 337).

The respondents could not have been acting within the scope of their duties or within the prosecutor's delegated discretion if the law specifically states that they had no authority to prosecute the Petitioner after he testified before the grand jury without signing or submitting a valid waiver of immunity to the grand jury. The respondents participated in the violation of Petitioner's constitutional and statutory right to counsel before the grand jury, due process, equal protection of the law and have knowingly acted in violation of the law.

Schloss v. Bouse, 876 F.2d 287 (2nd Cir.(N.Y.), 1989)

. . . *A government official does not have absolute immunity for acts that are "manifestly or palpably beyond his authority,"* Spalding v. Vilas, 161 U.S. 483, 498, 16 S.Ct. 631, 637, 40 L.Ed. 780 (1896), *or performed in the "'clear absence of all jurisdiction,'"* Stump v. Sparkman, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1872)). We have noted the applicability of this principle to prosecutors, stating that "*where a prosecutor acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy.*" Barr v. Abrams, 810 F.2d 358, 361 (2d Cir. 1987). In determining whether the prosecutor should on this basis be denied absolute immunity in a specific case, *we may look to the statutes that might have authorized the prosecution*, see id. at 361-62, *and deny absolute immunity if there was no colorable authority*; . . .

Rodrigues v. City of New York, 193 A.D.2d 79, 602 N.Y.S.2d 337 (N.Y.A.D. 1 Dept. 1993) (NO. 48053)

[6] Moreover, although a prosecutor is entitled to absolute immunity for those acts "within the scope

of his duties" (Rudow v. City of New York, 822 F.2d 324, 327 [2d Cir. 1987], quoting Imbler v. Pachtman, supra, 424 U.S. at 410, 96 S.Ct. at 985), where the prosecutor acts "in the clear absence of all jurisdiction" (Rudow at 328) and "without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy." (Id., quoting Barr v. Abrams, supra, 810 F.2d at 361.)

When an official is acting in knowing violation of law, "he should be made to hesitate." (Burns v. Reed, supra, 500 U.S. 478, ----, 111 S.Ct. 1934, 1944.) Accordingly, absolute immunity does not protect the prosecutor respondents with respect to the state law claims.

As the respondents prosecuted the Petitioner in violation of his right to transactional immunity as documented in "POINT TWO" and "POINT THREE", the respondents acted in violation of the law and in clear absence of all jurisdiction.

POINT TWO

THE PETITIONER NEVER SUBMITTED HIS ALLEGED WAIVER OF IMMUNITY TO THE GRAND JURY AND ASSUCH WAS ENTITLED TO TRANSACTIONAL IMMUNITYAND COULD NOT THEREAFTER BE PROSECUTED ON ANY MATTER UPON WHICH HE GAVE RESPONSIVE TESTIMONY

It is the Petitioner's position that he never waived his right to immunity before the grand jury as he did not submit any waiver of immunity to the grand jury as required by CPL §190.50(b).

Factual Background

In a "Supplemental Affidavit," sworn to May 11, 1998 (Exhibit 9) which was filed within 5 days of Petitioner's arraignment on May 8, 1998 and in further support of his

notice of motion to dismiss the indictment pursuant to CPL 210.20, Petitioner asserted:

> Mr. Horn [the Assistant District Attorney ("ADA") who presented this case to the Grand Jury] has stated to the respondent that he does not have the waiver in the file. Therefore, there is no proof that the waiver was submitted to the Grand Jury. Without the actual waiver, the requirements of CPL 190.50(5)(b) have not been met and the indictment must be dismissed and the respondent granted immunity from further prosecution.

(Exhibit 9).

At a hearing conducted February 3 and March 3, 1999 to ascertain whether Petitioner validly waived immunity at his Grand Jury appearance, this colloquy occurred:

> Mr. Horn: The final exhibit I have I previously discussed with Mr. Neidl so that I didn't have to have the grand jury stenographer come in and testify is a copy of the standard Albany County waiver of immunity form unsigned by the respondent but it is a photocopy of the blank that was used in this case.
>
> The Court: That will be People's nine. We'll mark it. Mr. Neidl?
>
> Mr. Neidl: Judge, I'll acknowledge it's a standard form of the district attorney's office but I certainly am not going to stipulate that it's an exact duplicate of what my client signed.
>
> The Court: With those factors I'm going to allow the People to introduce that as People's 9 in evidence with a conditional objection by the defense to be noted.
>
> Neidl: Just for the record, I think it should be on the record, Judge. I have requested and we've had conversation, me and he prosecutor about this issue but I just want to put in the record, I would like to inquire where is the original waiver

allegedly signed by my client and have the district attorney tell the Court. Either that or he is going to have to testify but I think he can just tell the Court it's missing.

The Court: He's an officer of this Court. Yes, Mr. Horn.

Mr. Horn: Your Honor the last time I saw the signed copy of that it was in the possession of Mr. Collins in the grand jury. After that I don't know what happened to it. * * *

The Court: * * * I am led to believe at this point that there will be no executed waiver of indictment [sic] that will be presented to this Court.

(Exhibit 10 and 11) There was no other colloquy concerning the waiver.

As pertinent here, CPL 190.40(2) provides:

A witness who gives evidence in a grand jury proceeding receives immunity unless:

(a) He has effectively waived such immunity pursuant to section 190.45

And, as pertinent here, CPL 190.45 provides:

1. A waiver of immunity is a written instrument subscribed by a person who is or is about to become a witness in a grand jury proceeding, stipulating that he waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 190.40, as a result of giving evidence in such proceeding.

2. A waiver of immunity is not effective unless and until it is sworn to before the grand jury conducting the proceed-ing in which the subscriber has been called as a witness.

Thus, under CPL 190.40, a witness who testifies before the Grand Jury receives immunity, unless he has effectively waived immunity pursuant to CPL 190.45. The latter section defines a waiver of immunity, and then explains that, to be effective, the waiver must be sworn to before the Grand Jury. Also, per the CPL 190.45 definition, to be effective, the waiver must be signed by the witness and must "stipulat[e] that he [the witness] waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 190.40, as a result of giving evidence in such proceeding." The requirements of CPL 190.45 are to be strictly complied with. See, People v. Higley, 70 NY2d 624, 626 (1987).

Here, the transcript of the Grand Jury proceeding establishes that, before the Grand Jury, Petitioner signed some document, apparently entitled "Waiver" (Grand Jury Transcript, (Exhibit 8). The transcript does not, however, establish the contents of that document. Accordingly, the transcript does not establish that the document complied with the requirements of CPL 190.45.

At the aforesaid hearing on February 3, 1999 and March 3, 1999 regarding whether Petitioner effectively waived immunity, the prosecutor introduced a document, marked as Exhibit 9 and entitled "Waiver of Immunity," which he represented to be a blank copy of the form Petitioner signed (Exhibits 11 - Page 2). Neither the prosecutor nor anyone else testified to the same. Petitioner's attorney acknowledged that the form was "a copy of a standard form of the district attorney's office," but he went on to say, "I certainly am not going to stipulate that it's an exact duplicate of what my client signed" (Exhibit 11 - Page 2).

It appears, then, that there was no evidence at the hearing that the form introduced as Exhibit 9 was an exact copy of the form Petitioner executed. It follows that there was no evidence at the hearing - and the record does not otherwise establish -- that Petitioner signed a form before the Grand Jury meeting the CPL 190.45 requirements for a valid waiver of immunity.

It must be concluded, therefore, that, in testifying before the Grand Jury, Petitioner received immunity - transactional immunity - and that the court below erred in allowing this prosecution to proceed. See generally, People v Higley, 70 NY2d 624 (1987) (Grand Jury witness receives transactional immunity where CPL 190.45 procedure for waiving immunity is not strictly followed); People v Chapman, 69 NY2d 497 (1987) (Grand Jury witness, whether voluntary or compelled, who does not effectively waive immunity under CPL 190.40(2)(a) receives transactional immunity); compare, People v Stewart, 92 NY2d 965, 966 - 967 (1998) (upholding waiver of immunity where there was literal compliance with CPL 190.45).

The grand jury transcript clearly documents that the alleged waiver of immunity was not submitted to the court as there is no statement in the record that it was. There are several statements concerning the signing of the alleged waiver, but not the submitting of the waiver to the grand jury. Again, these are two distinct acts that must be done in order for the Petitioner to waive his right to immunity before the grand jury. As stated in People v. Jorge, 172 Misc.2d 795, 660 N.Y.S.2d 257, 1997

> [6] "A witness who gives evidence in a grand jury proceeding receives immunity unless: [h]e has effectively waived such immunity ... or ..."

Respondent Horn allowed the Petitioner to testify without

submitting his waiver of immunity to the grand jury and, as such, Petitioner was entitled to receive immunity for his testimony.

CPL 190.50(5)(b) sets forth the procedure that must be followed when a respondent who has been held for the action of a grand jury by a local criminal court appears to testify before the Grand Jury. As pertinent here, CPL 190.50(5)(b) provides:

> Upon appearing [to testify before the Grand Jury], and upon signing *and submitting to the grand jury* a waiver of immunity pursuant to section 190.45, such person must be permitted to testify before the grand jury and to give any relevant and competent evidence concerning the case under consideration

(emphasis added).

Under CPL 190.50(5)(b), the signing and submitting of the waiver are distinct acts, just as subscribing and swearing are distinct acts that must both be done to effect a valid waiver of immunity. See, People v. Stewart, 92 NY2d 965, 967 (1998) (noting that, under CPL 190.45, a waiver of immunity is ineffective unless both subscribed and sworn to before a grand jury, for subscribing and swearing are "distinct acts that must occur for there to be a valid waiver").

As pertinent here, CPL 190.50(5)(c) provides that "any indictment obtained or filed in violation of the provisions of paragraphs (a) or (b) is invalid and, upon a motion made pursuant to section 170.50 or section 210.20, must be dismissed.....

The transcript of the Petitioner's Grand Jury testimony reflects that Petitioner executed a document referenced as a "waiver," that the Grand Jury foreman witnessed the document, and that the official Grand Jury stenographer notarized the witness's acknowledgment (Grand Jury

transcript (Exhibit 8 - Pages 1 thru 4)). The transcript does not reflect, however, that the document was ever submitted to the Grand Jury.

In his motion to dismiss following his arraignment, Petitioner pointed out that the respondents were unable to produce the waiver he allegedly signed, or even an executed copy thereof. Petitioner urged that, in light of this inability, the indictment must be dismissed pursuant to CPL 190.50(5)(c) as there was no proof that the waiver was "submitted" to the Grand Jury (Exhibit 9 - Pages 5 - 6). At a pre-trial hearing as to whether Petitioner effectively waived immunity, the respondents effectively conceded their inability to produce the original waiver or an executed copy (Exhibit 11 - Pages 2 - 3). In denying Petitioner's motion to dismiss the indictment, County Court did not specifically address this issue.

Under the foregoing circumstances, it must be concluded that the respondents did not establish that the putative waiver was "submitt[ed] to the Grand Jury," as CPL 190.50(5)(b) requires. It follows that the indictment should have been dismissed pursuant to CPL 190.50(5)(b) and (c) and that the respondents had no authority to further prosecute the Petitioner.

POINT THREE

PETITIONER DID NOT EFFECTIVELY WAIVE HIS RIGHT TO COUNSEL EVEN FOR PURPOSES OF ARRAIGNMENT IN CITY COURT, LET ALONE FOR PURPOSES OF THE GRAND JURY PROCEEDING AND WAS THEREFORE ENTITLED TO TRANSACTIONAL IMMUNITY

Petitioner's indelible right to counsel attached on January 26, 1998, upon the filing of a felony complaint against him in Albany City Court, which commenced the criminal action. See, People v Chapman, 69 NY2d 497, 500

(1987); People v Samuels, 49 NY2d 218 (1980); People v Kirk, 275 AD2d 983 (4h Dept. 2000); CPL 1.20(16), (17). "[T]hat right continued throughout the criminal proceeding..... Chapman, supra; see also, People v Kirk, supra. Moreover, "since respondent had already been accused of a serious crime, his appearance before the Grand Jury was unquestionably an occasion 'when legal advice is most critically needed' (People v Settles, 46 NY2d 154, 164)." Chapman, supra.

For the reasons which follow, it must be concluded that Petitioner never effectively waived his right to counsel. Specifically, the following analysis will demonstrate that the putative waiver was ineffective because the procedures mandated by the Criminal Procedure Law to validly waive the right to counsel were not followed; because the waiver was not unequivocal; because City Court had no jurisdiction to determine a valid waiver for purposes of a Grand Jury appearance; and because the waiver was not shown to be knowing, intelligent and voluntary.

A. Pursuant to the clear provisions of the Criminal Procedure Law, Petitioner, when appearing before Albany City Court, did not waive his right to counsel

A city court, such as Albany City Court, is a "local criminal court" (CPL 10.10(3)(c)). CPL article 180 concerns proceedings in local criminal courts. As pertinent here, CPL 180.10(5) provides:

> *A respondent who proceeds at the arraignment without counsel does not waive his right to counsel*, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision three which are necessary to effectuate it, and that he may exercise such rights at any stage of the action.

(emphasis added). CPL 180.10(5) could not be clearer: "A respondent who proceeds at the arraignment [in a local criminal court upon a felony complaint] without counsel does not waive his right to counsel..... Plainly, Petitioner's statement, at the arraignment, "I will represent myself" (Exhibit 6 - Page 2), was not a waiver of the right to counsel. To deem it a waiver of the right to counsel it must be concluded that Petitioner's decision to proceed without counsel at the arraignment was not a waiver of the right to counsel as to any part of the ensuing criminal prosecution, including the critically important Grand Jury proceeding.

Even ignoring CPL 180.10(5)'s express limitation of the effect of a decision to proceed without counsel at the arraignment, other language in CPL 180.10 precludes the conclusion that, at the arraignment, Petitioner waived his right to counsel at any future proceeding, including the Grand Jury proceeding.

CPL 180.10(3) and (4) provide as follows:

> 3. The defendant has a right to the aid of counsel at the arraignment [before a local criminal court upon a felony complaint] and at every subsequent stage of the action, and, if he appears upon such arraignment without counsel, has the following rights:
>
> (a) To an adjournment for the purpose of obtaining counsel; and
>
> (b) To communicate, free of charge, by letter or by telephone, for the purpose of obtaining counsel and informing a relative or friend that he has been charged with an offense; and
>
> (c) To have counsel assigned by the court in any case where he is financially unable to obtain the same.
>
> 4. The court must inform the respondent of all rights specified in subdivisions two and three. The court

must accord the respondent opportunity to exercise such rights and must itself take such affirmative action as is necessary to effectuate them.

Here, City Court advised Petitioner of his right to counsel at the arraignment (Exhibit 6). In violation of CPL 180.10(3), (4) and (5), however, the court failed to advise him of his right to counsel at all subsequent stages of the action, including the Grand Jury proceeding. Nor did the court inform Petitioner that, by proceeding without counsel at arraignment, **he did not waive his right to counsel at subsequent proceedings**. If, at his Albany City Court arraignment, Petitioner can be said to have effectively waived his right to counsel in future proceedings, though City Court failed to apprise him of this information, then CPL 180.10 might as well be expunged. Clearly, City Court's failure to apprise Petitioner of this information precludes a finding of waiver of the right to counsel in future proceedings, including the Grand Jury proceeding.

B. At his City Court arraignment, Petitioner did not unequivocally waive his right to counsel in future proceedings

To be effective, a waiver of the right to counsel must be, inter alia, "unequivocal". People v Smith, 92 NY2d 516, 519 (1998); People v Slaughter, 78 NY2d 485, 491 (1991). Here, before City Court, Petitioner did not unequivocally waive his right to have counsel at the Grand Jury proceeding, held three months after the arraignment.

At Petitioner's City Court arraignment, the court advised Petitioner that it would have the Public Defender represent him. Petitioner then expressed his dissatisfaction with the Public Defender's performance in a prior matter, and explained that he did not want the Public Defender to represent him.

City Court then asked, "What is your proposal regarding representation?" Petitioner replied, "I will represent myself' (Exhibit 6 - Page 2).

Petitioner made no statement at the arraignment suggesting that he had resolved to represent himself *throughout* the criminal action, including the Grand Jury hearing, pre-trial hearings and trial. Certainly, he did not unequivocally assert that he did not wish to have counsel in future proceedings. At most, Petitioner's statement, "I will represent myself' (Exhibit 6 - Page 2), could be taken as an unequivocal expression of intention to represent himself at the proceeding *that day* - the arraignment - rather than to have the Public Defender represent him. To unequivocally express an intention to waive his right to counsel as to future proceedings, Petitioner would at least have had to state that he intended to give up that right as to *future* proceedings.

Since Petitioner did not *unequivocally* waive his right to counsel as to future proceedings, he did not *effectively* waive his right to counsel as to those proceedings, which would include the Grand Jury proceeding. See, People v Smith, 92 NY2d 516, supra; 78 NY2d 485, supra.

C. Because Albany City Court is a local criminal court, it had no jurisdiction over the Grand Jury proceeding, and City Court's determination as to whether Petitioner had waived his right to counsel was of no effect in the Grand Jury proceeding

At the hearings held on February 3, 1999 and March 3, 1999 concerning whether Petitioner had effectively waived his right to counsel, Albany City Court Judge Herrick did not testify that he had determined that Petitioner was waiving his right to counsel for purposes of the Grand Jury proceeding or in the superior court. Rather, he testified, he "allowed [Petitioner] to represent himself *in my court, in Albany City*

Court" (Exhibit 10 - Page 2) (emphasis supplied).

Indeed, Judge Herrick had no jurisdiction to determine whether Petitioner was effectively waiving his right to counsel for purposes of the Grand Jury proceeding. As noted above, a City Court, such as Albany City Court, is a "local criminal court" (CPL 10.10(3)(c)), as opposed to a "superior court", which term includes Supreme Court and County Court (CPL 10.10(2)(b)). When Petitioner, purportedly acting pro se, waived a preliminary hearing on February 3, 1998 (Exhibit 7), City Court must be presumed to have promptly forwarded the felony complaint and any other pertinent papers to the superior court (CPL 10.10(2)(b)), whereupon City Court lost jurisdiction. See, People v Daniel P., 94 AD2d 83, 89 (2nd Dept. 1983); People v Simmons, 180 Misc.2d 1006, 1008 (Rochester City Court 1999); CPL 180-30(l). Moreover, Grand Juries are empanelled by superior courts, not local courts (see, CPL 190.10), and, therefore, are not subject to a local court's jurisdiction. People v Daniel P., supra.

City Court itself recognized its lack of jurisdiction over Grand Jury proceedings. After Petitioner purportedly waived a preliminary hearing, the court stated: "This court has now lost jurisdiction of this matter" (Exhibit 7 - Page 3).

Having no jurisdiction over the Grand Jury proceeding at which Petitioner appeared, City Court could not have determined whether Petitioner was effectively waiving his right to counsel for the purpose of that proceeding. Even if City Court had purported to determine whether Petitioner was effectively waiving his right to counsel for purposes of the Grand Jury proceeding, the determination would have been of no consequence, and the waiver of no effect before the Grand Jury. If such a determination could be made by any court in the absence of counsel -- and it is not clear that it could see, People v Chapman, 69 NY2d 497, 501, fn 1

(1987)) -- it could be made only by a superior court, for no other court would have jurisdiction to make it. Because Petitioner never appeared before a superior court until after his Grand Jury appearance, no court ever effectively determined that Petitioner was waiving his indelible right to counsel that attached upon filing of the felony complaint.

D. Under prevailing case law, the record is insufficient to establish that Petitioner's alleged waiver of the indelible right to counsel was knowing, voluntary and intelligent; accordingly, there was no effective waiver

The respondents will most likely argue that Petitioner knew the risks of self-representation and there was no need for the court to have a colloquy with the Petitioner concerning those risks. For the following reasons, this position must be rejected, and it must be concluded that Petitioner's right to counsel (New York Constitution, article 1, section 6; US Constitution, Amendments 6, 14) was violated in the Grand Jury proceeding.

People v Smith, 92 NY2d 516, 519 - 520 (1998), contains the Court of Appeals' most recent detailed discussion of the requirements for an effective waiver of the right to counsel in a criminal proceeding:

> This Court has recognized that respondents may insist on foregoing the benefits associated with the right to counsel and proceeding on a pro se basis. We have consistently also cautioned, however, that the waiver of this fundamental right to counsel requires that a trial court must be satisfied that a respondent's waiver is unequivocal, voluntary and intelligent; otherwise the waiver will not be recognized as effective (see, People v Slaughter, 78 NY2d 485; People v Sawyer, 57 NY2d 12, rearg dismissed 57 NY2d 776, cert denied 459 US 1178 [19831).

To ascertain whether a waiver meets these appropriately rigorous requirements, the trial courts "'should undertake a sufficiently "searching inquiry" "in order to be " 'reasonably certain'" that a respondent appreciates the .... dangers and disadvantages" of giving up the fundamental right to counsel" (People v Slaughter, supra, at 491; see, People v Sawyer, supra, at 21, citing Faretta v California, 422 US 806, 835; compare, People v Smith, 68 NY2d 737 [involving a respondent's request to proceed pro se]). Governing principles demand that appropriate record exploration between the trial court and respondent be conducted, both to test an accused's understanding of the waiver and to provide a reliable basis for appellate review (see, People v Sawyer, supra. at 21).

When a record lacks the requisite "searching inquiry" or fails to measure up to the prescribed standards, a waiver of the right to counsel will be deemed ineffective (see, id.; People v Slaughter, supra). To pass muster, a "searching inquiry" must reflect record evidence that respondents know what they are doing and that choices are exercised "'with eyes open' " (see, Faretta v California, supra, at 835, quoting Adams v United States ex rel. McCann, 317 US 269, 279).

This Court has also signified that these record exchanges should affirmatively disclose that a trial court has delved into a respondent's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver (see, People v McIntyre, 36 NY2d 10, 17). To be sure, this dialogue may occur in a nonformalistic, flexible manner, but it must accomplish the goals of adequately warning a respondent of the risks inherent in proceeding pro se, and apprising a respondent of the singular importance of the lawyer in the adversarial system of adjudication (see, People v Kaltenbach, 60 NY2d 797, 799; see also, United States v Plattner, 330 F2d 271, 276-277)

(emphasis added). The Court of Appeals could not have been clearer: for an effective waiver, there must be an on-the-record colloquy between the court and the respondent warning of the risks of self-representation and of the advantages of having a lawyer.

The Court of Appeals has repeatedly emphasized the need for such a colloquy. People v Slaughter, 78 NY2d 485, 491 (1991); People v Chapman, 69 NY2d 497, 501 (1987); People v Vivenzio, 62 NY2d 775, 776 (1984); People v Mitchell, 61 NY2d 580, 583 - 584 (1984); People v Kaltenbach, 60 NY2d 797, 798 - 799 (1983); People v Sawyer, 57 NY2d 12, 21 (1982), cert denied 459 US 1178; People v White, 56 NY2d 110, 117 - 119 (1982); People v Harris, 85 AD2d 742, 744 (2nd Dept. 1981), affd on opinion below, 58 NY2d 704(1982) (requiring new trial, despite the respondent's extensive criminal record, where court engaged in no colloquy with respondent to apprise him of risks of pro se representation). The Court has never held that an effective waiver of the right to counsel can be found without such a colloquy.

Similarly, in Faretta v California, 422 US 806, 807 - 808, 836 (1975), dealing with the 6th Amendment right to counsel, the Supreme Court found a valid waiver where the respondent was warned, in an on-the-record colloquy, that he was making a mistake and that he would have to follow the rules of trial procedure.

Other courts have required on-the-record colloquy informing the respondent of the advantages and disadvantages of proceeding without counsel in order for the respondent to "knowingly and intelligently" waive his right to counsel.

Quinones v. Keane, 1998 WL 851583 (S.D.N.Y., Dec 07, 1998) (NO. 97 CIV. 3173 (KTD))

> . . . In order to represent himself, a respondent must "knowingly and intelligently" waive his right to counsel. Id. at 835. While a respondent need not have the skill and experience of a lawyer in order to effect such a waiver, he must be made aware of the advantages and disadvantages of proceeding without counsel. Id.
>
> To that end, the Second Circuit Court of Appeals has held that:
>
> To ensure the waiver is knowing and intelligent, a trial court should engage the respondent in an on-the-record colloquy. From respondent's answers and from its own observations, the trial court must be persuaded that the waiver is a rational one, and that respondent has the mental capacity to comprehend the consequences of relinquishing a constitutional right. An accused must therefore have the disadvantages of proceeding without counsel pointed out to her and must be shown to possess sufficient ability to understand the nature of the proceedings against her.

People v Chapman, supra, is worthy of special attention because it involves waiver of the right to counsel in testifying before the Grand Jury. In Chapman, the respondent was represented by retained counsel at his arraignment on a felony complaint. Id. at 498. Thereafter, retained counsel was relieved by court order. Id. On the date scheduled for Grand Jury presentment, the "respondent appeared, unrepresented.... and indicated to the Assistant District Attorney that he wished to testify." The respondent then appeared before the judge presiding over the Grand Jury, who explained:

> that he would have to sign an irrevocable waiver of immunity before he would be permitted to testify, that he would then be required to answer every question posed, that his testimony could later be used against him and that he might regret his decision "[down] the road." When respondent told

> the court that he felt that he had to testify to "clear up" the matter, the court simply admonished him not to take the matter "too lightly" and wished him "good luck." Following this discussion, respondent signed an immunity waiver.

Id. at 499. Thereafter, before the Grand Jury, the respondent "acknowledged that he did understand the significance of the immunity waiver as it was explained to him by the Judge." Id. Also, the respondent stated that he had not been aware of his right to have counsel with him in the Grand Jury room. Id. The respondent then executed a waiver of immunity, and proceeded to testify. Id. at 500.

The Court of Appeals held that the respondent's indelible right to counsel arose upon the filing of the felony complaint. Thus, the court concluded that the respondent's purported waivers of the right to counsel and the right to immunity, both made in the absence of counsel, were ineffective. Id. at 500 - 501.

The Court of Appeals also held that the presiding Judge's colloquy with the respondent preceding his Grand Jury appearance was insufficient to sustain the respondent's purported waiver:

> Although the Judge . . . informed respondent of the consequences of waiving his right to remain silent, no mention was made of the importance of independent legal counsel or the imprudence of making the decision to appear and testify without first obtaining the advice of a trained, experienced attorney. In light of these omissions, it can hardly be said that the court's inquiry was sufficiently searching to assure that any waiver of the right to counsel that may have occurred was made intelligently and with full knowledge of the "'dangers and disadvantages'" of forgoing constitutional protection (cf., People v Sawyer, 57 NY2d 12, 21; People v White, 56 NY2d 110).

Id. at 501.

People v. Bartok, 209 AD2d 530 (2nd Dept 1994), dealt with facts quite similar to those here, in that the grand jury waiver of immunity was obtained absent counsel or judicial inquiry. The Appellate Division held that the resultant indictment, prosecution and judgment of conviction were invalid because the respondent had acquired transactional immunity, and that further prosecution was precluded. Id. at 530-531. See also, People v. Valvano, 131 AD2d 615 (1987).

Here, City Court undoubtedly failed to follow the procedure mandated by the Court of Appeals in Smith, supra, Chapman, supra, and the many other cases in which the court has addressed the effectiveness of a waiver of the right to counsel at a fundamental stage of a criminal proceeding. City Court engaged in no colloquy with Petitioner, formal or informal, warning him "of the risks inherent in proceeding pro se" and "apprising [him] of the singular importance of the lawyer in the adversarial system of adjudication." Smith, supra at 520. Instead, City Court merely informed Petitioner that he had "the right to an attorney" (Exhibit 6). The court never explained, or even suggested, the disadvantages of waiving that right, or the advantages of exercising it. Thus, here the judicial colloquy was even more limited than the inadequate one in Chapman, supra, where the court at least told the respondent that he might regret his decision and that he should not make it "too lightly." Id. at 499. Moreover, the only judicial colloquy here did not even concern the decision to proceed without counsel before the Grand Jury; instead, it dealt with a far less consequential decision: whether to proceed without counsel at an arraignment on a felony complaint.

In addition to Chapman, supra, other courts have clearly held that a respondent who appears before a grand jury does not waive his right to immunity unless counsel is present or a judicial inquiry has been done on-the-record and that the respondent is entitled to transactional immunity for his testimony.

People v. Kirk, 713 N.Y.S.2d 620, 2000 N.Y. Slip Op. 08093 (4th Dept. 2000)

> *The Grand Jury waiver of immunity, obtained in violation of respondent's right to counsel, was therefore ineffective and conferred transactional immunity upon respondent* (see, People v. Chapman, supra, at 503-504, 516 N.Y.S.2d 159, 508 N.E.2d 894; see also, CPL 190.40; People v. Bartok, 209 A.D.2d 530, 530-531, 619 N.Y.S.2d 626, lv. denied 85 N.Y.2d 935, 627 N.Y.S.2d 997, 651 N.E.2d 922; People v. Valvano, supra, at 616, 516 N.Y.S.2d 507).

People v. Valvano, 131 A.D.2d 615, 516 N.Y.S.2d 507 (2nd Dept. 1987)

> The respondent's right to counsel had clearly attached at the time he appeared before the Grand Jury (see, People v. Settles, 46 N.Y.2d 154, 164, 412 N.Y.S.2d 874, 385 N.E.2d 612; People v. Hobson, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894). *That right could not then be waived without his attorney being present.* Absent an effective waiver of the right to counsel, the respondent's waiver of immunity was not valid and he acquired transactional immunity which precludes his further prosecution in this matter (see, CPL 190.40; People v. Chapman, supra; CPL 50.10[1].

For all the foregoing reasons, it must be concluded that Petitioner did not effectively waive his right to counsel before the Grand Jury and was therefore entitled to transactional immunity and could not be thereafter prosecuted for any

matter or thing upon which he gave responsive testimony.

POINT FOUR

1983 ACTION MAY PROCEED EVEN THOUGH THE Petitioner'S HABEAS CORPUS PROCEEDING HAS BEEN DENIED BASED UPON FAILURE TO EXHAUST STATE REMEDIES

Parkhurst v. State of Wyo., 641 F.2d 775 (10th Cir.(Wyo.) May 11, 1981)

> [1] As to the first two requests for relief, these are clearly challenges to the fact of his confinement and are cognizable only by way of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500, 93 S.Ct. 1827, 1841, 36 L.Ed.2d 439 (1973). Petitioner states in his complaint that his direct criminal appeal is presently pending before the Wyoming Supreme Court. We thus conclude he has not yet exhausted state remedies challenging his conviction as required by s 2254.
>
> [2][3] Petitioner's money damage claim seeks a remedy other than release from confinement and is not cognizable in a habeas action. But the Supreme Court has held that this difference in remedy between a habeas claim and a §1983 claim does not ipso facto preclude their joinder in a single lawsuit. See Wolff v. McDonnell, 418 U.S. 539, 554, 94 S.Ct. 2963, 2973, 41 L.Ed.2d 935 (1974). If the habeas claim happens to fail for lack of exhaustion, a claim properly brought under §1983 may nevertheless proceed while exhaustion runs its course in state proceedings. Id. See also Henderson v. Secretary of Corrections, 518 F.2d 694, 695 (10th Cir. 1975).

The Petitioner is currently appealing his conviction on the above grounds that he was entitled to transactional immunity and that the criminal mischief statute was unconstitutional as it fails to define the term "damage". The Petitioner was forced to

file his complaint before his appeal could be heard in state court as the respondents had moved in a state supreme court to bar the Petitioner from suing them as documented in the Petitioner complaint.

POINT FIVE

DISTRICT COURT AND COURT OF APPEALS RULINGS

The district court and the Court of Appeals simply took the position that the respondents had immunity from suit because they are prosecutors. The lower courts failed to address the issue of whether or not the respondents were acting within the scope of their jurisdiction and whether there is case law or state statute that expressly deprived the respondents of the authority to prosecute the Petitioner once he appeared before the grand jury and was entitled to receive transactional immunity as he did not submit a waiver of immunity to the grand jury and he did not sign a valid waiver of immunity as he did not have counsel present and their was no judicial inquiry.

The lower courts should have first determined whether the Petitioner had legally waived his right to counsel before the grand jury by addressing the issues of 1) was the Petitioner entitled to transactional immunity because his alleged waiver of immunity was not submitted to the grand jury as required by CPL 190.50(b) and (c) and 2) was the Petitioner entitled to transactional immunity as there was no judicial inquiry and the Petitioner did not have counsel present when the district attorney had him sign an alleged waiver of immunity before the grand jury.

Secondly, the lower courts should have determined whether the respondents were acting within the law and within the scope of their authority. In order to address this issue the court should have addressed the issue of whether

there was any law, statute or case law, that deprived the respondents of their authority to prosecute the Petitioner.

The lower courts argument that Petitioner was given an opportunity to amend his complaint to name those who did not have prosecutorial immunity is not an issue as his argument was the respondents were not entitled to prosecutorial immunity which they refused to address the issues raised.

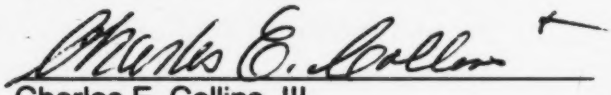
The lower courts have made there ruling which contradicts previous court rulings that hold that prosecutors must be acting within the scope of their authority and not in violation of the law. Petitioner has clearly shown that they were acting not only in violation of the law, but in violation of the law that deprived them of jurisdiction to prosecute the petitioner and by doing so have sanctioned the illegal prosecution and imprisonment of the petitioner which departs from the accepted and usual course of judicial proceedings.

CONCLUSION

The Petition for *Certiorari* should be granted.

Dated: May 21, 2002

Respectfully submitted,



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APPENDIX INDEX

Exhibit 1 - Summary Order U.S. Court of Appeals dated 2/22/02

Exhibit 2 - Decision and Order dated 4/7/01, filed 4/11/01

Exhibit 3 - Judgment in Civil Case dated 4/11/01

Exhibit 4 - Order dated 9/25/00

Exhibit 5 - Order dated 11/15/00

Exhibit 6 - Transcript of arraignment 1/26/98

Exhibit 7 - Transcript of hearing 2/3/98

Exhibit 8 - Grand Jury transcript 4/28/98

Exhibit 9 - Supplemental Affidavit dated 5/11/98

Exhibit 10 - Transcript pages 2/3/99

Exhibit 11 - Transcript pages 3/3/99

[Seal]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley, Square, in the City of New York, on the 22nd day of February Two thousand and two.

PRESENT: Hon. Ellsworth Van Graafeiland,
Hon. Robert A. Katzmann,
Circuit Judges,

Hon. Edward R. Korman, [1]
District Judge.

Charles E. Collins, III,

Plaintiff-Appellant,

- against -

SUMMARY ORDER
No. 01-7739

Sol Greenberg, James Nixon and Christopher D. Horn

Filed February 22, 2002

Defendants-Appellees.

APPELLANT: (on submission) Charles E. Collins, 111, pro se, Troy, NY

APPEARING FOR APPELLEES: Roche, Corrigan, McCoy,

---

[1] The Honorable Edward R. Korman. Chief Judge for the Eastern District of New York.

& Bush (Robert P. Roche, Esq., on the Brief), for Sol Greenberg, James Nixon, and Christopher D. Horn.

Appeal from the United States District Court for the Northern District of New York (McAvoy, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is AFFIRMED.

Charles E. Collins, III, pro se, and fee-paid, appeals from the district court's sua sponte dismissal of his § 1983 complaint as frivolous. In September 2000, Collins filed a § 1983 complaint against Sol Greenberg, the Albany County District Attorney, and James Nixon and Christopher D. Horn, both Albany County Assistant District Attorneys. In his complaint, Collins alleged that the defendants had maliciously prosecuted him and falsely imprisoned him despite having been divested of jurisdiction over his case by virtue of the fact that he was denied his right to counsel at various preliminary stages of his criminal case. Specifically, Collins claimed that he was not informed by the presiding judge that he had a right to have counsel present at his arraignment and during the grand jury presentation, and that the defendants were aware that Collins had not been informed of this right. According to the complaint, Collins was convicted of criminal mischief in the second degree, and sentenced to one and a third to four years imprisonment.[2]

Collins sought (1) $40,000,000 in damages from Horn and Greenberg, and $5,000,000 in damages from Nixon; (2) punitive damages to be determined by a jury; (3) additional damages for each day he would continue to spend in

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[2] The conviction stemmed from an incident where Collins sprayed the New York Court of Appeals with chicken manure in an apparent attempt to make a political statement.

custody; and (4) treble damages under the Racketeer Influenced Corrupt Organizations Act.

By order filed September 25, 2000, the district court sua sponte dismissed Collins's complaint as frivolous based upon the absolute prosecutorial immunity enjoyed by the defendants. The court further noted that to the extent Collins sought damages for malicious prosecution and false arrest, his claims were barred absent an allegation that the criminal proceedings terminated in his favor. The court directed Collins to file an amended complaint within thirty days of the court's order naming defendants which are not immune from suit.

This Court reviews a sua sponte dismissal of a complaint pursuant to § 1915(c)(2) de novo. See Giano v. Goord, 250 F.3d 146, 149-50 (2d Cir. 2001). In this case, the court properly determined that the prosecutors actions were entitled to absolute immunity. It is well-settled that prosecutors enjoy absolute immunity from liability under § 1983 in suits seeking damages for acts carried out in their prosecutorial capacities, See Imbler v. Pachtnian, 424 U.S. 409, 431 (1976), Moreover, Collins's claims involving malicious prosecution and false arrest and imprisonment require a showing of a favorable disposition, which Collins cannot establish. See Tavarez v. Reno), 54 F.3d 109, 110 (2d Cir. 1995) (relying on Heck v. Humphrey, 512 U.S. 477, 486 (1994), for the proposition that in a § 1983 claim for malicious prosecution, the plaintiff must allege favorable disposition of the charges because a conviction is presumptive evidence that cause existed for the prosecution).

Specifically, Collins concedes that he was convicted by a jury of the charges, and sentenced to a term of imprisonment. In fact, his appellate brief appears to indicate that his direct appeal is currently pending in the New York

State Courts. Even applying a liberal construction to Collins's filings in opposition to the defendants' motion for summary judgment, Collins did not state facts sufficient to revive the claims dismissed by the district court. Therefore, at this time, Collins is unable to meet the requisite showing to proceed with his claims as contained in his complaint.

Lastly, given the district court's explicit warnings that failure to file an amended complaint could result in dismissal of his suit, the district court's April order dismissing the complaint for failure to amend was proper. As discussed above, as drafted, the original complaint was frivolous, and, therefore, in the absence of an amended complaint, the district court did not err in dismissing the entire matter.

For the reasons discussed, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By:

Lucille Carr, Deputy Clerk

[Seal]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Charles E. Collins, III,

Plaintiff,
-against-

1:OO-CV-1349

Sol Greenberg; James Nixon;
and Christopher D. Horn,

Defendants.

Filed April 11, 2001

DECISION & ORDER

MCAVOY, D.J.

Plaintiff commenced the instant action on September 5, 2000 asserting claims pursuant to 42 U.S.C. § 1983 based on allegations that defendants prosecuted him without proper authority.

On September 25, 2000, this Court issued a Decision & Order, familiarity with which is assumed, finding that conduct of the defendants which forms the basis of plaintiffs complaint can fairly be characterized as associated with their conduct in initiating and pursuing criminal prosecution" and, therefore, defendants were entitled to absolute prosecutorial immunity. Collins v. Greenberg, et al., 00-CV-1349, Dkt. (N.D.N.Y. Sept. 25, 2000); see also Pinaud V. County of Luffolk, 52 F.3d 1139, 1147 (2d Cir. 1995). For that reason the Court dismissed plaintiff's complaint and ordered him to file an amended complaint, within 30 days of the date of the order,

alleging wrongful conduct against defendants who were not immune from suit. The Court further ordered that should plaintiff fail to file such an amended complaint, the complaint be dismissed without further of the Court.

Plaintiff did not file an amended complaint, rather, on October 24, 2000, he appealed the September 25, 2000 order. On October 27, 2000, defendants filed a motion for summary judgment, arguing the merits of the case rather than immunity. On November 27, 2000, the Court stayed the action pending resolution of plaintiff's appeal. On March 1, 2001, the Court of Appeals dismissed plaintiff's appeal sua sponte because plaintiff's action was still pending in this Court.

Plaintiff has responded to defendants' summary motion, however, he has not filed an amended complaint asserting causes of action against defendants who are not subject to prosecutorial immunity. Because the Court the instant complaint in its September 25, 2000 Order and Plaintiff has not filed an amended complaint, there is currently no complaint pending in the instant action. Accordingly, plaintiff's case must be dismissed and defendants' motion for summary judgment denied as moot.

For the foregoing reasons, plaintiff's case is DISMISSED) and defendants' summary judgment motion is DENIED as moot, IT IS SO ORDERED

April 7, 2001
Binghamton on New York

Hon. Thomas J. McAvoy
U. S. District Court

[Seal]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CHARLES COLLINS, III

JUDGMENT IN A CIVIL CASE

vs.

CASE NO. 1:00-CV-1349

SOL GREENBERG, ET AL

_____ JURY VERDICT. This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX DECISION BY COURT. This action came to trial of hearing before the Court. The issues have been tried or heard and decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's case is DISMISSED and Defendants, motion for summary judgment is DENIED AS MOOT.

In accordance with Judge McAvoy's Decision and order filed on April 11, 2001.

Dated: April 11, 2001

LAWRENCE K. BAERMAN
Clerk of the Court

s/ A. Topa
By: Deputy Clerk

[Seal]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CHARLES E. COLLINS, III,

Plaintiff.

- against-

1:00-CV-1349
(TJM)(DRH)

SOL GREENBERG, JAMES NIXON and CHRISTOPHER D. HORN,

Defendants.

APPEARANCES:
CHARLES E, COLLINS, III
Plaintiff, pro se
108 Brunswick Road
Troy, NY 12180

Filed September 25, 2000

THOMAS J. MCAVOY, JUDGE

DECISION and ORDER

1. **Background.**

Presently before this Court is a civil rights complaint filed by Charles E, Collins, III ("plaintiff or "Collins"),[1] Plaintiff has paid the filing fee required to commence this action.

For the reasons stated below, the Court dismisses the instant complaint sua sponte as without arguable basis in law.

In his pro se complaint, Collins alleges that the defendants District Attorney Sol Greenberg and assistant

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[1] Collins has several other actions pending in this District. See Collins v. Loughren, No 9:99-CV-2155: Collins v. Campbell, No. 1: 00-CV-1348. (Collins v. Loughren is not me)

district attorneys James Nixon and Christopher D Horn -- "had no authority or jurisdiction to prosecute the plaintiff on or after April 28, 1998" and that the defendants "participated in [plaintiffs] false imprisonment." Docket no. 1 at 2. For a complete statement of plaintiffs claims, reference is made to the entire complaint filed herein.

Section 1983 establishes a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. German v. Fed. Home Loan Mortg. Corp., 885 F.Supp. 537, 573 (S.D.N.Y. 1995) (citing Wilder v. Virginia Hosp. Assn, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. SS 1983)) (footnote omitted); see also Myers v. Wollowitz, No. 95-CV-0272, 1995 WL 236245, *2 (N.D.N Y. Apr. 10, 1995) (McAvoy, C.J.) (SS 1983 "is the vehicle by which individuals may seek redress for alleged violations of their constitutional rights,") (citation omitted).

However, the Court notes that "prosecutors are absolutely immune from liability under § 1983 for their conduct in initiating a prosecution and in presenting the State's case." Pinaud v. County of Suffolk, 52 F.3d 1 1 39, 1147 (2d Cir. 1995) (internal quotations and citations omitted); see Dory v. Ryan, 25 F.3d 81, 83 (2nd Cir. 1994) (prosecutorial immunity covers virtually all acts, regardless of motivation, associated with the prosecutor's function, including conspiracies to present false evidence) Myrick v Keane, et al., No. 96-CV-1 360, slip op. at 2 (N.D.N.Y. Apr. 14. 1997) (Pooler. J.). This immunity also applies to individual district attorneys arising out of acts "within the scope of their duties in initiating and pursuing criminal prosecution," Id. (internal quotations and citations omitted). The conduct of the defendants which forms the basis of plaintiff s complaint can fairly be characterized as

associated with their conduct in initiating and pursuing criminal prosecution.

Since the only defendants in this action are completely immune from liability, plaintiff has failed to state a claim herein and the Court must dismiss his complaint. See Wachtler v. Herkimer County, 35 F.3d 77, 82 (2d Cir. 1994) (District Court has power to dismiss case sua sponte for failure to state a claim); Brady v. Marks, 7 F. Supp. 2d 247, 249 (W.D.N.Y. 1998) (District court may sua sponte dismiss complaint based upon prosecutorial immunity); Thomas v. Scully, 943 F.2d 259, 260 (2d Cir. 1991) (per curiam) (A district court has the power to dismiss a complaint sua sponte for failure to state a claim so long as the plaintiff is given notice and an opportunity to be heard); Fitzgerald v. First East Seventh St. Tenants Corp., 221 F.3d 362, 363 (2d Cir. 2000) (District Court may dismiss action sua sponte notwithstanding fact the plaintiff has paid statutory filing fee.[2]

Should Collins claim that his action should not be dismissed, he is hereby ordered to file an amended complaint within thirty (30) days of the filing date of this Order. Such amended complaint must allege wrongful conduct against defendant(s) who are not immune from suit.

WHEREFORE, it is hereby

ORDERED, that plaintiff shall file an amended complaint, if at all, within thirty days of the filing date of this Order,

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[2] Moreover, to the extent that plaintiff seeks damages for alleged malicious prosecution and false arrest, such claims are barred because plaintiff has failed to demonstrate that the criminal proceedings in question terminated in his favor. *See Channer v. Mitchell*, 43 F.3d 786, 787 (2d Cir, 1994); *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Edwards v Balisok*, 520 U.S. 641 (1997); *Amaker v. Weiner*, 179 F.3d 48, 51 (2d Cir. 1999).

llisting therein individuals who are not immune from suit, and it is further

ORDERED, that if plaintiff fails to file an amended complaint within thirty (30) of the filing date of this Order, this action will be dismissed without further Order of this Court. The Clerk shall refrain from entering judgment dismissing this action until the expiration of such period of time. and it is further

ORDERED, that upon the filing of any such amended complaint, the Clerk shall forward the file in this matter to the Court for further review. and it is further

ORDERED, that the Clerk serve a copy this Order on Collins by regular mail

IT IS SO ORDERED.

Dated: September 23 2000
Watertown, New York

Thomas J.McAvoy
U.S. District Judge

[Seal]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CHARLES E. COLLINS, III,

Plaintiff,

-against- 00-CV-1349

SOL GREENBERG, et. al.,

Defendant.

Filed November 15, 2000

ORDER

McAvoy, D.J.:

Defendants have moved for summary judgment pursuant to FED. R. Civ. P. 56. In their moving papers, however, Defendants failed to notify Plaintiff, who appears pro se, of the import of a summary judgment motion and of the potential consequences of a failure to properly oppose such a motion. Accordingly, the Court will do so. See Champion v. Artuz, 76 F.3d 483 (2d Cir. 1996).

In order to properly respond to a motion for summary judgment, a party must submit an affidavit or affidavits based on personal knowledge and set forth facts that would be admissible as evidence at trial. It is insufficient to merely deny the assertions in the moving party's affidavits or to rely on the pleadings. If the party opposing a motion for summary judgment fails to submit affidavits or admissible evidence controverting the assertions made by the moving party, the Court will deem as true those assertions made by the

moving party. The affidavits must establish that there is a genuine issue of fact requiring a trial. FED. R. Civ. P. 56(e) provides as follows:

> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The plaintiff is advised to read FED. R. Civ. P. 56 in its entirety.

In addition, pursuant to this Court's local rules of practice, motions for summary judgment must be accompanied by a statement of material facts setting forth, in numbered paragraphs, those facts that the moving party contends there exists no genuine issue. See N.Y.N.D.L.R. 7.1(a)(3) . Each fact listed must be supported by a reference to a citation in the record where the fact is established. The party opposing a motion for summary judgment is required to file a response to the statement of material facts that mirrors (in identically numbered paragraphs) the movant's statement of material facts. In the response, the party opposing the motion is required to either admit or deny each of the moving

party's assertions, if the party opposing the motion denies an allegation in the statement of material facts, then that party must set forth a specific citation in the record where the factual issue arises. Any facts set forth in the statement of material facts will be deemed admitted unless specifically controverted by the non-moving party. Plaintiff is referred to the Court's local rules, see N.D.N.Y.L.R. 7.1(a) and to the Court's pro se handbook for other pertinent information.

A plaintiff opposing a motion for summary judgment should be aware that, if the motion is granted, certain or all of the causes of action in the complaint may be dismissed without a trial. In other words, if the motion is granted, there is a possibility that this action will be terminated in the defendants' favor and there will be no trial. Accordingly, is very important for the non-moving party to appropriately respond to a summary judgment motion.

Now that plaintiff has been informed of the nature and consequences of a summary judgment motion, the Court will permit plaintiff until December 6, 2000 to prepare papers in opposition to the motion for summary judgment and to serve his papers on defendants and file the papers with this court.

Plaintiff should note that his papers must be received by the Court no later than 5:00 p.m. on December 6, 2000.

IT IS SO ORDERED

DATED: November 15, 2000
Albany, New York

Thomas J. McAvoy
U.S. District Judge

STATE OF NEW YORK
ALBANY CITY COURT CRIMINAL PART

THE PEOPLE OF THE STATE OF NEW YORK

- against -

CHARLES COLLINS,

Defendant.

PRELIMINARY HEARING

BEFORE: HON. STEPHEN W. HERRICK
Albany City Court Judge

APPEARANCES: HON SOL GREENBERG
District Attorney, Albany County
Albany County Court House
Albany, New York 12207
By KATHLEEN BOLAND, ESQ
Assistant District Attorney

TRANSCRIPT OF PROCEEDINGS in the above matter held at Albany City Court, Criminal Part, at the Public Safety Building, Morton Avenue at Broad Street, Albany, New York, on Monday, January 26, 1998.

THE COURT: I am going to provide you with copies of the charges. You are charged by Officer Tremblay of Division 2 of the Albany Police Department with criminal mischief in the second degree, in violation of Section 145.10 of the Penal Law of the State of New York. This is a Class D felony.

It's alleged at 5:45 this morning at the N.Y.S. Court of Appeals Building at 20 Eagle street in the City of Albany, New York, you did with intent to damage the property of another person, having no right to do so or any legal grounds to believe you had the right to damage the property of another in an amount exceeding $1,500. It is specifically

alleged knowing you had no right to do so and with the intent to damage the property of another, you intentionally sprayed chicken excrement on a 20 foot by four foot tapestry and on the front of the building, total damage in excess of $1,500.

You are charged with criminal tampering in the third degree, a Class B misdemeanor in violation of Section 145.14 of the Penal Law. At 5:45 this morning at the same location, the N.Y.S. Court of Appeals Building, it is alleged, having no right to do so and no reasonable grounds to believe you had such right, you tampered with the property of another person and intentionally caused substantial inconvenience to a third person. It is alleged you intentionally sprayed chicken excrement on the frontal exterior of the building.

You have a right to an attorney and the right to an adjournment in order to obtain an attorney. If you cannot afford an attorney, I will appoint one to represent you. Can you afford your own attorney?

MR. COLLINS: No. I can't.

THE COURT: I am going to enter a plea of not guilty. I will have the public defender speak to you.

MR. COLLINS: I would prefer not to have the public defender's office.' The last time I had them, they lied to me. They didn't do their job. They refused to discuss this case with me.

THE COURT: What is your proposal regarding representation?

MR. COLLINS: I will represent myself.

THE COURT: I have provided you with copies of the charges. I have some statement. I have not provided you with copies of it yet. I am going to have copies made and I will get copies of those right now. Do the People have a recommendation on bail for the Class D felony and Class B misdemeanor?

MS. BOLAND: Based on the seriousness of these charges at approximately 6 a.m. at the Court of Appeals Building, the People recommend this defendant be remanded to the custody of the Albany County Sheriff with no bail.

THE COURT: Mr. Collins, the People recommend no bail here. Having had experience previously with Mr. Collins, it's my recollection that you appear when you are supposed to appear; however, this is a serious matter so I will set bail. I am going to set bail in the amount of $7,500.

MR. COLLINS: Could I get it reduced? I always appeared the other times before this Court. The charges were dismissed on the merits of the case. Also, the DA's office the last time requested bail be high even though I demanded to go to trial.

THE COURT: I'm looking at a statement by you which makes a substantial admission and based on the criteria as I understand it for setting bail, I feel $7,500 is an appropriate amount for bail, especially in light of the District Attorney's Office requesting I remand you without bail so I am going to set bail in the amount of $7,500, either cash or secured bond.

I am going to issue an order of protection. The order of protection will be in reference to the two named witnesses who I am unfamiliar with but their addresses are listed on the statement which you just received copies of.

MR. COLLINS: I would like to block it out. I am not interested in the witnesses.

THE COURT: You have not received those?

MR. COLLINS: No.

THE COURT: It's whited out. You don't need an order of protection in reference to that. I'm also going to issue an order of protection that directs you have no illegal contact with Chief Judge Kaye or any member of the Court of Appeals. You are to stay away from the Court of Appeals Building while the charges are pending. I'll get you your order of

protection in a few minutes.

You will get a telephone call so you can have somebody help you with the bail. Are you going to be able to make that?

MR. COLLINS: I hope so.

THE COURT: In the event you don't make that, I will put it down for a hearing on Thursday, in the event you don't make bail.

MR. COLLINS: Excuse me?

THE COURT: In the event you don't make bail, you are entitled to a preliminary hearing on the felony this Thursday, the 29th at 2:00 or sometime after 2. Judge Egan will be there. If you do make bail, you need to be back here on the 29th, to discuss another adjourned date and where we are going with the proceeding. All right, sir.

(The matter was adjourned.)

(The matter was reconvened shortly thereafter.)

THE COURT: You made bail. I don't think I need to see you on Thursday now that you are out on bail and you are now representing yourself. The District Attorney is going to want to review the file to determine whether to proceed with the felony or reduce it to a misdemeanor. That is what they are going to do. Do you want a different adjourned date than the 29th?

MR. COLLINS: Whatever is convenient.

THE COURT: I will put it over a week from today to the 2nd.

MR. COLLINS: I have a court date on February 2 -- not criminal.

THE COURT: What's good?

MR. COLLINS: Anything after the 2nd.

THE COURT: February 3. You have your order of protection. Stay away from Chief Judge Kaye. I think you made your statement. I will see you a week from tomorrow.

(The matter was adjourned.)

STATE OF NEW YORK COUNTY OF ALBANY
CITY COURT OF ALBANY CRIMINAL PART

THE PEOPLE OF THE STATE OF NEW YORK

- against - Docket No.: 98-92108

CHARLES E. COLLINS,

Defendant.

PRELIMINARY HEARING

Albany City Court
Criminal Part 1
Public Safety Building of Albany
Morton Avenue
Albany, New York 12202
February 3, 1998

BEFORE: HON. STEPHEN W. HERRICK
Albany City Court Judge

APPEARANCES: HON SOL GREENBERG
District Attorney, Albany County
Albany County Court House
Albany, New York 12207
(Christopher D. Horn, Assistant Albany County District Attorney, of Counsel)

Charles E. Collins, III
108 Brunswick Road
Troy, New York 12180
Defendant Pro se

Reported by:
Doris Schlamowitz, C.S.R.
Official Court Reporter

THE COURT: How are you, Mr. Collins?

MR. COLLINS: Good morning.

THE COURT: Mr. Collins appears on his own, appearing pro se, in this matter.

The People have indicated that this matter is being considered by their office for possible presentation to a Grand Jury.

Mr. Collins, at this point in time, how do you wish me to proceed? These are the charges contained a felony. How do you wish the Court to proceed?

MR. COLLINS: I'd like to go to the Grand Jury.

THE COURT: You want to waive this matter today for purposes of presentation to the Grand Jury?

MR. COLLINS: Yes; I would like to know when I am going to receive a date as to when to appear before the Grand Jury. The last time they took it up, they waited two months and never took it to the Grand Jury.

THE COURT: I can't fix a date this case is going to be presented to Grand Jury. I will mark this case waived to the Grand Jury.

The People are represented here today. They will notify you of the date. I am going to ask you, before you leave this morning, to make sure they have your correct mailing address phone number, whatever information you wish to give to them, so they may properly be in compliance with the Criminal Procedure regarding any presentation to the Grand Jury.

MR. COLLINS: Yes.

THE COURT: This Court has now lost jurisdiction of this matter, and make sure I have your correct address, Mr. Collins, in case this matter is remanded back here for reconsideration.

MR. COLLINS: Yes.

(Whereupon, the proceedings in the above-entitled action were concluded.)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

April Term
Case No.: 980140

CHARLES E. COLLINS, III,

Defendant.

CHARGE: CRIMINAL MISCHIEF, 2nd degree

PRESENTED: Tuesday, April 28, 1998

PRESENTED BY: HON. SOL GREENBERG
District Attorney of the
County of Albany

CHRISTOPHER D. HORN, Esq.,
Assistant District Attorney,
appearing for the People of the
State of New York.

PRESENT: THE GRAND JURY, A QUORUM.

(Whereupon, the witness enters the Grand Jury room alone).

CHARLES E. COLLINS, III after being duly sworn by the Foreman of the Grand Jury,was examined and testified as follows:

EXAMINED BY MR. HORN:

Q Would you please state your name and occupation for the court, sir?

A My name is Charles E. Collins, III, and I'm a paralegal.

Q Excuse me, could you keep your voice up?

A I'm a part-time paralegal.

Q And you are aware that the Grand Jury of Albany County is investigating an incident which occurred on

January 26th, 1998, at the Court of Appeals located at 20 Eagle Street in the city of Albany, county of Albany, state of New York, is that correct?

A What date did you say?

Q January 26th.

A That's correct.

Q And you have decided to proceed here pro se, as your own attorney, correct?

A That's correct.

Q And you are aware that under CPL Section 190.52 you have a right to have an attorney present in the room with you during this proceeding, if you so desire, and if you are unable to afford one one will be provided for you free of charge, is that correct?

A That's correct.

Q Okay. Now, you were charged with certain offenses related to this incident in Albany Police Court, in connection with this incident, is that correct?

A That's correct, two charges.

Q And you have indicated in your capacity as your own attorney that you wish to testify and give evidence before this Grand Jury?

A That's correct.

Q Now, prior to testifying I'm going to ask you to execute a document entitled waiver -- are you familiar with what it means to waive immunity?

A Yes, I am.

Q And do you understand that by signing this document you give up certain legal rights?

A That's correct.

Q Now, I gave you a copy of this document prior to you coming in here, is that correct?

A That's correct.

Q Please don't sign it quite yet.
A Okay.
Q Have you had time to review that document?
A Yes, I have.
Q Okay. And you understand specifically that you give up any immunity from prosecution which you would otherwise obtain by testifying before the Grand Jury?
A That's correct.
Q And do you understand that any statements you make to this Grand Jury will definitely be used against you in this proceeding and any other proceedings?
A That's correct.
Q With those admonitions in mind I furnished you already a copy of the waiver. Please take a few moments and examine it.
A (The witness examines the document).
MR. HORN: And if you wish to execute this document please do so in the presence of the Grand Jury Foreman. (Whereupon, the witness executes the waiver of immunity; the Foreman of the Grand Jury signs the document as a witness thereto;and the official Grand Jury stenographer, a notary public, takes the witness's acknowledgment).
BY MR. HORN (continuing):
Q Now, showing you this document entitled waiver -- did you sign that in the presence of the Foreman of the Grand Jury?
A Yes, I did.
Q Have you read the document?
A Yes, I have.
Q Do you understand the document?
A Yes, I do.

Q Do you swear to the truthfulness of the matters contained within that document? What do you mean by the truthfulness, it says I'm waiving my immunity.
Q And that is your intent?
A That's my intent.
Q Everything it states in that document is true?
A That's correct.
Q Now, it's my understanding that you wish to make a statement to the Grand Jury concerning the incident which took place in front of the Court of Appeals in the city of Albany, county of Albany, state of New York, on January 26th, 1998, at between 5:30 and 5:45 a.m., is that correct?
A That's correct.
Q I'll ask you to confine your comments to the events of that morning, your whereabouts at that time and your actions, if any. Is that acceptable to you?
A I believe I also have the right to present evidence and stuff.
Q You may present evidence that's relevant to the question of whether or not you committed the offense which this Grand Jury is investigating?
A Okay.
Q Do you understand that?
A In other words, what you are stating then is that I can't present any evidence as to corruption or as to why I did it and...
Q I'm instruction you that motive is not an element of this offense. You may address whether or not it was in fact you in front of the Court of Appeals, what you may have done, and any of your actions?
A But nothing else?
Q Correct.

A Why is that?

Q I'm not here to teach you the law, sir, I'm simply instructing you what the law is.

A So, in other words you are not allowing me to present any documentation that I had a legal right to do it, is that correct?

Q The Grand Jury is investigating whether or not you committed this act. You may address whether or not you had a legal right to do it, that's a relevant issue.

A Okay, and I may present evidence as to whether or not I had a legal right to do it?

Q Sure.

A Thank you.

Q Now, with that in mind would you like to make a statement to the Grand Jury?

A Yes, I would. I'd like to present evidence too.

Q Proceed please.

A Can I stand up, I find it more comfortable. Hi, how are you all doing today. First off I did spray the New York State Court of Appeals with chicken manure on the 26th day of 1998, I did it specifically to get arrested and I did it specifically to protect my constitutional and civil rights as well as everybody's else's rights in this state that are being violated. A number of issues before the court, this is, why did I pick the Court of Appeals. Very simply, Chief Judge Judith Kaye... am I allowed to present evidence as to what was given to the police when I was arrested and everything and was part of it with me at the time or not? You said I can present evidence as to...

Q Sir, please keep your colloquy to a minimum. You may present relevant evidence concerning the incident which happened at the Court of Appeals on January 26th, 1998.

A Okay. First off I'm hoping that you will indict me. That's probably a different opinion of most people coming in here, but I'm looking for a Jury trial simply because I did have a legal right to spray the Court of Appeals.

Q Sir, let me stop you right there. Do you know that if you had a legal right to spray the Court of Appeals with chicken manure then you have not committed the offense of criminal mischief in the 2nd degree?

A Well, therefore again I would request that the court indict me on either that charge or I believe they can also reduce the charge, they can do whatever they want about the charges, and I'm also charged with tampering in the 3rd degree, which is a Class B misdemeanor.

Q That charge is not being presented to this Grand Jury.

A Only one charge? Then I'll request that the court indictment me on that charge because obviously I'm not going to be allowed to present evidence as to the illegal actions of Judge Kaye in holding that any people who are imprisoned in this state don't have a right to a public trial and there's a lot of other things. The DA's office for the past five years ... I have been arrested before ... has refused to even investigate the corruption and when I was arrested I have given to the police and it's in the...

Q Sir, I'm going to stop you right there. Your motive in doing this is not relevant as to whether or not you in fact did this. You are limited to evidence which is relevant to whether or not you committed this offense.

A Then I most certainly did commit the offense.

Q Thank you. Just to be clear, on January 26th, 1998, at approximately 5:45 a.m. did you intend to damage property which belonged to the Court of Appeals of the State of New York?

EDITOR'S NOTE

ORIGINAL PAGINATION IS NOT CONTINUOUS

A Did I intend to damage property? I don't know if property was damaged.

Q Did you intend to damage property?

A I intended to demonstrate the corruption in the New York State Judiciary. I know one of the issues before the court is you can't prove intent, therefore there's no indictment, therefore based upon that I'd have to say my intent was to spray the, Court of Appeals with chicken manure.

Q And you intended to do that act?

A Yes, I did.

Q And you did that act?

A And I did that act.

Q And at that time and place did you proceed to damage property belonging to the Court of Appeals in an amount exceeding fifteen hundred dollars?

A I believe that's also one of the requirements of the offense. I think I'm going to stop at this point, I have admitted doing it.

Q Sir, you are not legally allowed to stop at this point. You waive immunity and you are now testifying before the Grand Jury and you have to proceed with your testimony. The question is ... or let me rephrase the question: on February 23rd, 1998, did you submit an affidavit to the Albany County District Attorney's office in which you stipulate that the amount of damage you did exceeded fifteen hundred dollars?

A For cleanup, yes.

Q You acknowledged that that cost more than fifteen hundred dollars?

A Yes, I did.

Q Now, you planned out this incident pretty extensively, would that be correct?

A Yes.

Q And where did you get the power spray?
A I rented it.
Q From whom?
A Some place over in Rensselaer.
Q Do you know, do you recall the name of the place?
A I know it's on some street in Rensselaer, the name of the place I don't know.
Q And where did you get a fifty-five gallon drum of chicken manure.
A I bought a drum some place up in Saratoga and I got the chicken manure at a chicken farm.
Q Okay, and how did you learn to use the spray or the drum?
A How did I learn to use it?
Q Did it come with instructions?
A No.
Q You just happened to know how to use that equipment?
A I'd say so. I mean, there were no instructions with it or anything.
Q And where did you get the pickup truck?
A It was my stepfathers.
Q And how long did you plan this little incident?
A A few months.
Q Okay, and part of the point of spraying the Court of Appeals with manure was that you knew you had no right to do so and would therefore be arrested, correct?
A That I had no right to do so, no, I believe I had a right to do so.
Q Do you own the Court of Appeals?
A No.
Q Do you own the building that the Court of Appeals is housed in?
A No.

Q Do you know who does own the building?
A Probably the state of New York.
Q Correct. Based on the fact that it belongs to someone else, did anyone in the Court of Appeals or the state of New York say "hey, why don't you come over to the Court of Appeals and spray us with chicken manure?"
A No.
Q Do you have any further statement you'd like to make?
A No. Obviously I'm not allowed to present any document or evidence and it's a one-sided thing in here.
Q You may present any evidence that has to do with whether or not you committed the offense in question that is being investigated by this Grand Jury?
A I admit I did spray the New York State Court of Appeals with chicken manure.
Q Now, it's my understanding that you would like to request that the Grand Jury subpoena certain individuals to give testimony in this proceeding. Would you tell the Grand Jury the names of the people that you would like to subpoena?
A Judge Judith Kaye and Michael Gaynor, among others, but obviously they don't have direct knowledge of what I did, but it was because of their illegal actions that I was forced to do it.
Q Once again, that is your allegation and you say that was your motive; however, that's not relevant to this proceeding.
A It's relevant in that your District Attorney's office is refusing to investigate illegal actions and filed false criminal charges against me in the past, so it's your position that the District Attorney's office is above the law?

Q I'm not taking any position, sir. This is one incident which we are investigating at this point in time and you are currently before the Grand Jury on that incident.

A Okay.

Q Do the individuals you are asking to be subpoenaed have any direct knowledge of what you did, though, that night?

A No, they don't.

Q Do you have any further statement that you would like to make to the Grand Jury?

A No.

MR. HORN: Okay, does the Grand Jury have any questions?

BY A JUROR: None.

MR. HORN: Thank you, sir.

THE WITNESS: How come in the book it says I have a right to present evidence?

MR. HORN: You are excused at this point in time. I'm the legal advisor to the Grand Jury and I have made my rulings.

THE WITNESS: Oh, isn't that nice, okay.

(Whereupon, the witness was excused)

STATE OF NEW YORK
COUNTY OF ALBANY COUNTY COURT

****

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against - **SUPPLEMENTAL AFFIDAVIT**

CHARLES E. COLLINS, III, Filed: May 11, 1998

Defendant.

****

STATE OF NEW YORK)
COUNTY OF RENSSELAER)ss.:

CHARLES E. COLLINS, III, being duly sworn, deposes and says:

1. That I am the Defendant in the above entitled matter and make this Supplemental Affidavit in further support of my Notice of Motion to Dismiss Indictment pursuant to CPL § 210.20, CPL § 210.35, CPL § 210.40, CPL § 190.40 and CPL § 190.50 (5)(c) dated May 6, 1998 and my Affidavit dated May 6, 1998.

2. CPL § 190.50 (5)(b) requires that when the defendant appears before the Grand Jury he sign a waiver of immunity pursuant to CPL § 190.45.

3. Defendant never legally signed the waiver of immunity as he had a constitutional and statutory right to counsel and, as such, he could not have signed the waiver with out counsel being present or a judicial inquiry. Defendant

did not have counsel present. As there was no judge present, there was no judicial inquiry. Therefore, defendant has transactional immunity which precludes any further prosecution in this matter.

People v. Valvano, 131 A.D.2d 615, 516 N.Y.S.2d 507 (2nd Dept. 1987)

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Farlo, J.), rendered August 5, 1985, convicting him of **criminal mischief** in the third degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is reversed, on the law, the indictment is dismissed, **with prejudice**, and the matter is remitted to the Supreme Court, Queens County, for entry of an order in its discretion pursuant to CPL 160.50.

The defendant's right to counsel had clearly attached at the time he appeared before the Grand Jury (*see, People v. Settles, 46 N.Y.2d 154, 164, 412 N.Y.S.2d 874, 385 N.E.2d 612; People v. Hobson, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894*). **That right could not then be waived without his attorney being present. Absent an effective waiver of the right to counsel**, the **defendant's waiver of immunity was not valid and he acquired transactional immunity which precludes his further prosecution in this matter** (*see,* CPL 190.40; *People v. Chapman, supra;* CPL 50.10[1].

People v. Bartok, 209 A.D.2d 530, 619 N.Y.S.2d 626 (2nd Dept. 1994)

ORDERED that the judgment is reversed, on the

law, the indictment is dismissed, with prejudice, and the matter is remitted to the County Court, Rockland County, for entry of an order in its discretion pursuant to CPL 160.50.

Inasmuch as the criminal prosecution against the defendant had commenced upon the filing of a felony complaint, his right to counsel indelibly attached thereupon (*see, People v. Samuels, 49 N.Y.2d 218, 424 N.Y.S.2d 892, 400 N.E.2d 1344).* Accordingly, his **Grand Jury waiver** of **immunity, obtained without the benefit of counsel, or judicial inquiry** (*see, People v. Mitchell,* 61 N.Y.2d 580, 475 N.Y.S.2d 355, 463 N.E.2d 1207; *cf., People v.* ***[209 A.D.2d 531] White,*** 56 N.Y.2d 110, 451 N.Y.S.2d 57, 436 N.E.2d 507) **was ineffective and caused the defendant to be cloaked in transactional immunity** (*People v. Chapman, 69 N.Y.2d 497, 516 N.Y.S.2d 159, 508 N.E.2d 894; People v. Valvano, 131 A.D.2d 615, 516 N.Y.S.2d 507).* **Thus, the indictment must be dismissed** (*see, People v. Higley, 70 N.Y.2d 624, 518 N.Y.S.2d 778, 512 N.E.2d 299).*

People v. Higley, 70 N.Y.2d 624, 518 N.Y.S.2d (1987)

. . . **CPL 190.40(2)(a) further provides that a witness who gives evidence in a Grand Jury proceeding receives immunity unless he "has effectively waived such immunity pursuant to section 190.45".** Because defendant's waiver of immunity was ineffective, his subsequent testimony before the Grand Jury rendered him immune from prosecution for all acts or transactions that were the subject of his testimony (*see, People v. Chapman, 69 N.Y.2d 497, 516 N.Y.S.2d 159, 508 N.E.2d 894*). The

present indictment, therefore, must be dismissed (CPL 50.10[1].

People v. Chapman, 69 N.Y.2d 497, 516 N.Y.S.2d 159 (1987)

A waiver of immunity obtained in violation of a Grand Jury witness' State constitutional right to counsel (N.Y. Const. art. I, § 6) **is not an effective waiver within the meaning of CPL 190.40(2)(a)**. Accordingly, where a Grand Jury witness testifies under such a constitutionally defective waiver, the witness, whether voluntary or compelled, **receives the automatic transactional immunity** conferred by that statute and **cannot thereafter be prosecuted for any matter on which responsive testimony has been given** (CPL 50.10[1]; *see, Matter of Rush v. Mordue, 68 N.Y.2d 348, 509 N.Y.S.2d 493, 502 N.E.2d 170*).

Initially, it is undisputed, and indeed is beyond dispute, **that the circumstances surrounding defendant's execution of the immunity waiver and his subsequent Grand Jury testimony constituted a violation of his State constitutional right to the assistance of counsel at every critical stage of the proceeding** (N.Y. Const. art. I, § 6). Regardless of whether he was actually represented at the time he appeared before the Grand Jury, **defendant's indelible right to counsel had attached when the felony complaint against him was first filed** (*see, People v. Samuels, 49 N.Y.2d 218, 424 N.Y.S.2d 892, 400 N.E.2d 1344*; *cf.*, CPL 190.52 [conferring waivable right to advice of counsel during testimony before the Grand Jury], and that right continued throughout the criminal proceeding, notwithstanding the order relieving the specific attorney who had represented him at

arraignment. Indeed, since defendant had already been accused of a serious crime, his appearance before the Grand Jury was unquestionably an occasion "when legal advice is most critically needed" (*People v. Settles,* 46 N.Y.2d 154, 164, 412 N.Y.S.2d 874, 385 N.E.2d 612). Accordingly, neither his uncounseled waiver of the right to such legal advice nor his immediately ensuing waiver before the Grand Jury of his statutory right to immunity may be deemed to be valid renunciations of those rights under the State Constitution.

4. People v. Straehle, 53 Misc.2d 512, 279 N.Y.S.2d 115 held that the procedure of moving to dismiss the indictment before trial to enforce immunity is authorized by People v. Freistadt, 6 A.D.2d 1053, 179 N.Y.S.2d 633; People v. Yonkers Contracting Co., Inc., 17 N.Y.2d 322, 270 N.Y.S.2d 745, 217 N.E.2d 829.

5. Defendant has the right to have Indictment dismissed pursuant to CPL § 190.50(5)(c) before trial begins as the grand jury proceeding did not comply with CPL § 190.50(5)(b).

6. CPL § 190.50(5)(b) states: ". . . Upon appearing at such time and place, and upon signing and **submitting** to the grand jury a waiver of immunity pursuant to section 190.45, . . ."

7. Mr Horn has stated to the defendant that he does not have the waiver in the file. Therefore, there is no proof that the waiver was submitted to the Grand Jury. Without the

actual waiver, the requirements of CPL § 190.50(5)(b) have not been met and the indictment must be dismissed and the defendant granted immunity from further prosecution.

8. Defendant requests that the Indictment be dismissed with prejudice as 1) he did not legally waive his right to counsel as required before the Grand Jury as he did not have counsel present; 2) there was no judicial inquiry when he signed the waiver of immunity before the grand jury; and 3) the waiver has been lost and was not submitted to the grand jury.

WHEREFORE, your deponent respectfully requests that an Order be granted directing the relief specified herein together with such other, different and further relief as this Court deems necessary and appropriate.

Charles E. Collins, III
108 Brunswick Road
Troy, New York 12180
(518) 274-0380

Sworn to before me this
11th day of May, 1998

s/
Notary Public

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

CHARLES E. COLLINS, III,

Defendant.

BEFORE: HON. LARRY J. ROSEN
Albany County Judge

APPEARANCES: For the People

PRESENTED BY: HON. SOL GREENBERG
Albany County District Attorney

CHRISTOPHER D. HORN, Esq.,
Assistant District Attorney.

For the Defendant

HON EUGENE DIVINE
Albany County Public Defender
BY: THOMAS NEIDL, ESQ.
Assistant Public Defender

Defendant in Person.

SHERRI SEELEY, Court Clerk
WAYNE P. MARTIN, Sr. Court Reporter

Third Judicial District

TRANSCRIPT OF PROCEEDINGS in the above-entiled matter commencing on February 3, 1999, in and for the County of Albany, at the County Courthouse, Albany, New York.

whether or not his request was unequivocal to represent himself?

A He wanted to represent himself, he did not want to be represented by the Public Defender; and there was a history regarding the Public Defender that I was aware of.

Q And to your recollection did he state that in ambiguous, or unequivocal fashion?

A He was very clear. To the best of my recollection, he was totally, absolutely clear that he wanted to represent himself and did not wish to be represented by the Albany County Public Defender's Office.

Q Had you had any prior experience with Mr. Collins at the time this conversation was taking place?

A Yes.

Q And did you consider your prior contact with the defendant and prior knowledge of the defendant in reaching a determination as to whether or not you would allow him to represent himself?

A Yes.

Q What was ultimately your decision on the of whether or not he could represent himself?

A I granted his request and allowed him to represent himself in my court, in Albany City Court.

Q Okay. Now, you said you had prior familiarity with the defendant. Would you please tell the Court what your prior familiarity with the defendant consisted of?

A Mr. Collins a few years ago-- best of my recollection '95 to 197-- could have been early '96 to early '97-- had charges in Albany Police Court. Then they were waived or bound over, then came back on a 180.40 order and were handled as misdemeanor cases or charges in Albany City Court, criminal part. And that involved criminal anarchy charges and a nuisance charge, I believe, regarding a smoke bomb in the parking garage of the Justice Building.

Q In connection with that case, were there any motions made on the case?

A Yes.

Q Do you recall who made those motions?

A Well, initially-- I won't say initially-- Mr. Collins made motions, the Public Defender made motions. Then subsequently Mr. Edwards, Paul Edwards, made motions. During all of the time Mr. Collins was making pro se applications to the Court.

MR. HORN: Could I have this marked

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

CHARLES E. COLLINS, III,

Defendant.

BEFORE: HON. LARRY J. ROSEN
Justice

APPEARANCES: For the People

PRESENTED BY: HON. SOL GREENBERG
Albany County District Attorney

CHRISTOPHER D. HORN, Esq.,
Assistant District Attorney.

For the Defendant

HON EUGENE DIVINE
Albany County Public Defender
BY: THOMAS NEIDL, ESQ.
Assistant Public Defender

Defendant in Person.

RICHARD STABILE,
Clerk of the Court
DENISE STANGLE, C.R.S.
Sr. Court Reporter
Albany County Court.

Transcript of proceedings held at a Trial Term of the Albany County Court House, Albany, New York on the third day of March, 1999.

MR. HORN: The final exhibit I have I previously discussed with Mr. Neidl so that I didn't have to have the grand jury stenographer come in and testify is a copy of the standard Albany County waiver of immunity form unsigned by the defendant but it's a photocopy of the blank that was used in this case.

THE COURT: That will be People's nine. We'll mark it. Mr. Neidl?

MR. NEIDL: Judge, I'll acknowledge it's a standard form of the district attorney's office but I certainly am not going to stipulate that it's an exact duplicate of what my client signed.

THE COURT: With those factors I'm going to allow the People to introduce that as People's 9 in evidence with a conditional objection by the defense to be noted.

(People's Exhibit No. nine was received and marked in evidence.)

MR. HORN: With that I don't have any further evidence to put on the record.

THE COURT: People rest?

MR. HORN: Yes, your Honor.

THE COURT: Mr. Neidl.

MR. NEIDL: Just for the record, I think it should be on the record, Judge. I have requested and we've had conversation, me and the prosecutor about this issue but I just want to put in the record, I would like to inquire where is the original waiver allegedly signed by my client and have the district attorney tell the Court. Either that or he is going to have to testify but I think he can just tell the Court it's missing.

THE COURT: He's an officer of this Court. Yes, Mr. Horn.

MR. HORN: Your Honor the last time I saw the signed copy of that it was in the possession of Mr. Collins in the grand jury. After that I don't know what happened to it. When we were collecting the evidence in grand jury at the end of the proceeding it simply wasn't present. It is my recollection that he actually executed two of those waivers with one copy being provided to Mr. Collins. And I would also ask if that is currently in his possession that a copy of it be given to the People.

People vs Collins

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MR. NEIDL: Judge my client never got -- did not leave grand jury with any, you know, if there is an allegation that my client stole the waiver I'm certainly objecting to that.

THE COURT: I certainly didn't take it as any such allegation. I am led to believe at this point that there will be no executed waiver of indictment that will be presented to this Court.

MR. NEIDL: Thanks, Judge.

THE COURT: That closes the proceedings. However I should ask you, Mr. Neidl, is it your desire to call a witness?

MR. NEIDL: I hate to impose on the Court but I'm going to ask you for a five minute recess to talk to my client.

THE COURT: Fine. may I just see you up here for a moment?

MR. NEIDL: Sure.

(Discussion held off the record.) (After a recess, the following transpired:)

THE COURT: It's approximately 20 minutes after two this Wednesday afternoon of March 3. We are back on the record in People vs. Collins.

I just want the record to be clear that

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 02-110

In The Supreme Court of the United States

CHARLES E. COLLINS, III,

Petitioner,

v.

SOL GREENBERG, JAMES NIXON and CHRISTOPHER D. HORN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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STATEMENT OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

The decision of the Second Circuit Court of Appeals is safe and sound. The appellant's position has been repeatedly ruled untenable and/or frivolous. The legal legerdemain attempted to be spun by claimant has no legal merit as no fraction of any entitlement to due process was violated.

STATEMENT OF THE CASE

Once again Mr. Collins is suing Sol Greenberg and Assistant District Attorneys in his office for what he describes as a violation under Section 1983 of the United States Code of his Constitutional rights. He claims that under color of state law they deprived the appellant of his right to counsel, his right to due process and his right to equal protection under the law. He further argued in the court below and in his appeal to this court that none of the defendants had judicial immunity as they acted in "complete absence" of any jurisdiction which he says is by "state statute and case law." Thus such deprived them of jurisdiction. The basis of his position in that regard will be expanded in one of the following points in this memorandum.

The plaintiff, then defendant, appeared before the City Court of Albany Criminal Division at which time the well aired colloquy took place between himself and Judge Herrick. The judge had previous experience with Mr. Collins not only in previous criminal matters but also in previous legal proceedings regarding visitation, custody and Family Court matters.

At that time Mr. Collins was asked if he wanted to have the Public Defender appointed. He eschewed the representation of the Public Defender advising the court that he would represent himself as he had many times in the past. Ultimately the case was moved to the Grand Jury. He appeared before the Grand Jury in April of 1998 to testify at which time a colloquy took place which is set forth in the appendix. This constitutes the transcript of proceedings before the Grand Jury which indicates that a waiver of immunity was signed before the Foreman of the Grand Jury, the Clerk of the Grand Jury and filed with the Grand Jury. It is later found to be missing at a hearing before Judge Rosen, a hearing which resulted in the Court's decision set forth at pages 111-119 of the Appendix, Mr. Collins, now claimant, testified before the Grand Jury asking them to indict him. The Grand Jury accommodated the plaintiff by indicting him. Now he is claiming before this Court that because he claims he was entitled to transactional immunity the District Attorney was devoid of any jurisdiction to prosecute him and using that fulcrum of false argument seeks to have his conviction overturned at the same time prospering a lawsuit for damages against the County of Albany, the District Attorney and the assistants in his employ.

When this case was filed initially Judge Thomas McAvoy, Federal District Court Judge *sua sponte* dismissed the complaint of the plaintiff on the basis that it was barred by the absolute prosecutorial immunity enjoyed by the District Attorney and his employees since it was functional immunity defined by the Federal District Courts and the United States Supreme Court. In keeping with the present status of the law Judge McAvoy granted to the claimant a period of 30 days from the filing of the

order dismissing his complaint to allow the service of an amended complaint which might allege wrongful conduct against a defendant or defendants who were not immune from suit. As part of that decision and order claimant was ordered to file an amended complaint, if at all, "within 30 days" of the filing date of that order listing there individuals who were not immune from suit and setting forth a claim or cause of action against them on which Federal relief may be granted by that court.

Mr. Collins chose not to do so but chose instead to appeal. Since the defendants had not been put on notice of the *sua sponte* decision dated September 23, 2000 they moved instead of answering for Summary Judgment on several grounds. That motion the judge ordered stayed due to the fact that in the interim Mr. Collins further compounded the matter by filing a notice of appeal from Judge McAvoy's *sua sponte* decision rather than complying with the judge's order to file an amended complaint.

The Second Circuit Court of Appeals dismissed the appeal because there was a matter pending before the District Court which resulted in a second order of Judge McAvoy dated April 7, 2001 rendering the Summary Judgment motion by the defendants as moot, once again dismissing the plaintiff's complaint for failure to follow the prior order of the court and as such dismissing it because as the court below said "There is currently no complaint pending in the instant action. Accordingly, plaintiff's case must be dismissed and defendants motion for Summary Judgment denied as moot."

ARGUMENT

POINT I

THE DISTRICT COURT BELOW HAD THE AUTHORITY AND PROPERLY EXERCISED IT *SUA SPONTE* TO DISMISS THE CLAIM OF CHARLES E. COLLINS, III AGAINST DEFENDANTS GREENBERG, NIXON AND HORN.

THE *sua sponte* AUTHORITY OF THE COURT

The leading case regarding the District Court's ability to dismiss *sua sponte* a case filed with the Clerk of the Court is *Leonhard v. The United States*, 633 F.2d 599, see note at 609, [note 11] (2d Cir. 1980), *cert. denied*, 451 U.S. 908. That case affirmed the long held position that a District Court had the inherent power to dismiss an improperly filed or inadequately stated claim as long as the District Court in doing so afforded to the claimant notice and an opportunity to be heard. *Thomas v. Scully*, 943 F.2d 259 and *Perez v. Ortiz*, 849 F.2d 793.

Leonhard stands for the proposition that the District Court has the power to dismiss a complaint *sua sponte* for failure to state a cause of action or to establish a cause of action for which the Federal Court can grant relief. (Citing *Robins v. Rarebach*, 325 F.2d 929 (2d Cir. 1963), *cert. denied*, 379 U.S. 974; C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 593 (1969); *Taub v. Hale*, 355 F.2d 201 (2d Cir. 1966).

The case of *Perez v. Ortiz* cited above has an interesting discussion on the issue of motions *sua sponte* in it and cites several principal authorities which are also in support of the defendants position in this matter. (*Perez v.*

Ortiz, 849 F.2d 793 at 797) The *Perez* case cites the Federal Rules of Civil Procedure § 12(e) which grant the inherent power to the Court to overview complaints filed with it as well as the specific provisions of 28 U.S.C. § 1915(v) which refers to 2A Moore's Federal Practice § 1207(2)(5). These cases and authorities support the general position found in *Leonhard* that as long as the claimant is given "an opportunity" to be heard under such parameters as the Court deems fair and just, dismissal *sua sponte* is an appropriate oversight to be exercised by the District Courts. *Square D Corporation v. Niagara Frontier*, 760 F.2d 1347 (2d Cir. 1985); *Lewis v. New York*, 547 F.2d 45-46 (note 4) (2d Cir. 1976), *aff'd*, 476 U.S. 409. The Courts have thus held that as long as there is an opportunity to the claimant to be heard after the oversight by the District Court is exercised there is no deprivation of due process. *In re Schlesinger Investment*, 671 F.2d at 742. Such an opportunity was afforded Collins.

In another vein is the case of *Thomas v. Scully*, 943 F.2d 259 which references § 1959(d) of 28 U.S.C. affirming the statutory scheme that the inherent power in the District Court is codified to allow oversight exercised by the Court as long as the procedure employed is "fair". Fair has later been interpreted to mean "as long as the claimant has an opportunity to be heard" in whatever the Court deems is an appropriate forum and afforded as much time as necessary to effect that fair hearing.

If the Court finds that any pleading is inadequate on its face it is no longer necessary that the pleading be deemed "frivolous" in order to justify its dismissal under 1915(v). Thus a District Court may exercise its oversight to determine that, based on the facts as stated in the complaint and given their most fair reading, the case

cannot result in a verdict for the plaintiff, i.e., there is no Federal relief to be granted, the case is an appropriate case for the District Court to exercise its discretion and oversight and dismiss *sua sponte*. *Neitzke v. Williams*, 490 U.S. 319 (1989).

THE ABSOLUTE IMMUNITY OF THE PROSECUTORS

The Court below in its initial decision dismissing the case *sua sponte* cited the case of *Pinaud v. Suffolk*, 52 F.3d 1139 (2d Cir. 1995) at page 147 et seq. That case, among other things, says specifically "Congress did not intend § 1983 to abrogate immunities well grounded in history and reason." citing *Buckley v. Fitzsimmons* and *Tenney v. Brandhoue*, 341 U.S. 367. The Court specifically held there,

> "The doctrine of absolute prosecutorial immunity creates a formidable obstacle for a plaintiff seeking to maintain a civil rights action against a District Attorney, as it provides that 'prosecutors are absolutely immune from liability under § 1983 for their conduct in initiating a prosecution and presenting the State's case' in so far as that conduct is intimately associated with the judicial phase of the criminal process." Citing *Burns v. Reed*, 500 U.S. 478 at 486 (1991) further quoting *Imbler v. Patchman*, 424 U.S. at 430/31.

The Second Circuit Court of Appeals in *Pinaud* held that " . . . to preserve the integrity of the judicial process and to enable zealous performance of prosecutorial duties without the constant threat of legal reprisals" the court will support absolute immunity for prosecutors as long as

the prosecutorial action which is performed is in the "functional" aspect of the prosecutor's duties. *Hills v. New York*, 45 F.3d 653 at 656 (2d Cir. 1995); *Gregoire v. Biddle*, 177 F.2d 579 at 581 (2d Cir. 1949) (Learned Hand, Justice); *Powers v. Coe*, 728 F.2d 97 (2d Cir. 1984) a case which describes the "functional" approach to the immunity question.

Another principal case in this chain and line of successive cases is *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994) where the Federal District Court and the Second Circuit Court of Appeals affirmed that a prosecutor enjoys absolute immunity in Section 1983 cases even when it is alleged that he "conspired to convict the defendant" and even if it is alleged to be based on perjured testimony. His absolute immunity extends to all actions "relating to advocacy", although the court did find in affirming the decision in *San Filippo v. U.S. Trust*, 737 F.2d 246 (2d Cir. 1984) that prosecutorial immunity does not extend to all actions that are extrajudicial acts and therefore not covered in his prosecutorial duties. Such is not Collins' claim here.

A pivotal case before the United States Supreme Court was *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606 (1993) which was the first case of note to apply the "functional" approach to prosecutorial immunity. It was in that case that the court there formulated the language that ultimately became the benchmark of prosecutorial immunity in a functional approach as " . . . intimately associated with the judicial phase of the criminal process."

The Second Circuit has held both in *Barrett v. The United States*, 797 F.2d 565 (2d Cir. 1986) and *Daloia v. Rose*, 849 F.2d 74 (2d Cir. 1988) that immunity attaches to

the prosecutor's function not to the manner in which he performs the function. Hence, in this case the function of prosecuting the claimant, then defendant, would be a protected activity.

Brady v. Marks, 7 F.Supp.2d 247 was a case which also dealt with prosecutorial immunity whose reasoning is found repeated in the *Dory v. Ryan* case (cit. supra) where the court held " . . . we recognize that there is a greater societal goal in protecting the judicial process by preventing perpetual suits against prosecutors for the performance of their duties." *Imbler v. Patchman*, 424 U.S. 409 (note 32) (1976) at pages 426-428.

Therefore it is paramountly clear that the District Court had more than ample reason on the face of the pleading to exercise its discretion and *sua sponte* to dismiss the case at hand as it is covered with absolute prosecutorial immunity.

POINT II

THE PLAINTIFF HEREIN "EFFECTIVELY WAIVED" HIS IMMUNITY WHEN HE APPEARED BEFORE THE GRAND JURY AND KNOWINGLY EXECUTED A WAIVER OF IMMUNITY WHICH ISSUE HAS BEEN ALREADY JUDICIALLY REVIEWED.

Judge Larry Rosen whose total decision and order appears in the appendix to the plaintiff's brief at pages A111-119 sums up one judicial view of the evidence, the testimony and the parsing engaged in by the plaintiff in the following quotation, " . . . the quintessential elevation of form over substance to hold that the defendant did not waive immunity under these circumstances." Citing *People v. Hethington*, 172 Misc.2d 840.

The appellant puts great emphasis on § 190.45 of the Code of Criminal Procedure dealing with Grand Jury waiver of immunity. That section essentially holds 1) that the waiver must be written and subscribed by the witness and 2) that it must be sworn to in the presence of the Grand Jury, i.e., before the Grand Jury. Beginning at page A52 of the appendix to the appellant's brief the dialogue and the transactions which occurred before the Grand Jury show clearly the following facts:

The appellant identified himself as a paralegal. Not as he sometimes quotes a part-time paralegal but as a paralegal.

He was asked the following question, " . . . [have you] decided to proceed here pro se as your attorney," "Correct?" Answer: "That's correct".

The record shows that the plaintiff was advised of his right to counsel when asked about his knowledge of and his entitlement to counsel he was asked if he knew he had the right to counsel at this proceeding and it at all proceedings to which he responded, "That's correct."

When he was reminded of the two charges that were filed against him so that there can be no question that he knew what he was facing he answered, "That's correct, two charges."

When inquired of him as to whether he chose to act as his own attorney and whether he still wished to testify, acting as his own attorney he said, "That's correct."

Following the above events he was asked to execute a document entitled "Waiver" and asked if he was familiar with what it means to waive immunity to which he answered "Yes I am."

He was further asked whether he knew that by signing such a document he would give up certain legal rights and he said again "That's correct."

He was also asked if he had a prior opportunity to review the document, [that is the waiver], and whether it had been given to him in advance of his appearance before the Grand Jury so that he could review the same and analyze the same and he advised "That's correct."

Again asked if he had time to review it he answered, "Yes, I have."

He was then specifically asked, "Do you specifically give up immunity from prosecution in exchange for the right to testify here?" to which he said "That's correct."

He was then admonished that any statement he gave *will definitely* be used against him in this or any other proceeding, questioned as to his acknowledgment of that knowledge to which he responded "That's correct."

Following that colloquy he was then urged to take additional time and after having done so he executed the waiver of immunity. The Foreman of the Grand Jury signed the document as a witness thereto and the official Grand Jury stenographer who was a notary public took the witness' acknowledgment.

It was on that basis that Judge Rosen (A111-119) found that he had effectively waived his immunity stating that it would have been the quintessential elevation of "form over substance" to have held that he did not in fact effectively waive.

What the claimant here is attempting to say is that at a later time after that colloquy took place establishing all

of the aforesaid elements of the waiver, that the original waiver cannot be found. If in fact through error Mr. Collins picked up and walked out of that Grand Jury room with that waiver, we have now elevated sleight of hand to sleight of reasoning, however unintentional.

Following that colloquy Mr. Collins testified before the Grand Jury and admitted that he committed the acts which formed the factual basis of the criminal complaint and that such acts were done by him at the time and the place set forth in the charges because of circumstances which he felt formed his "unique right" to protest the judicial system and that by exercising his right of free speech in that manner the same could not constitute the commission of a crime.

The case at bar is not a new lawsuit in this court as this claim was substantially submitted previously and voluntarily withdrawn when Mr. Collins was noticed to appear for an examination before trial to be placed under oath. This conduct by Mr. Collins presents to this court a clear abuse of the judicial process and the very thing which the Supreme Court sought to avoid the "endless chain" of litigation against prosecutors for the clear and simple reason of doing their jobs. *Buckley v. Fitzsimmons* (cit. supra)

This unsophisticated shell game which Mr. Collins is exercising is a manipulation of the judicial system involving the expenditure of taxpayer's funds to defend repeated and frivolous litigation to further foster his newfound hobby, to harass the judicial system.

He brought an action in the County Court of Albany County to seek a writ of prohibition prohibiting the District Attorney from proceeding further against him before

he went to trial in this case. He brought it on the same basis that the alleged violation of § 190.45 and 190.50 of the Code of Criminal Procedure barred the defendants herein from prosecuting him as a matter of law. Later the Appellate Division Third Department, Supreme Court of the State of New York unanimously held in reviewing Judge Rosen's decision that not only was the writ of prohibition an inappropriate vehicle for the relief that the claimant sought but approvingly cited Judge Herrick's judicial inquiry at the initial time of arraignment. This inquiry by Herrick is however, criticized by Mr. Collins as inappropriate and falling far short of the "judicial standard."

One of Mr. Collins' complaints is he was denied effectively the right of counsel and that he *could not* waive the right of counsel although in each of the six prior litigations commenced in either the Supreme Court of the State of New York or in Federal District Court Mr. Collins pursued each and every one of these cases pro se. They have all ended either in a court order dismissing his case or his voluntary discontinuance and withdrawal of the claims. Judge Rosen cited in his decision [cited previously] that the court's judicial inquiry as to whether or not the willingness to proceed pro se was intelligent, knowing and appropriate noted with approval the meticulous, accurate and well constructed pro se brief and pro se motion papers filed by Mr. Collins and the underlying prohibition motion before the County Court in May of 1998. All of these judgments were inherently affirmed by the Appellate Division in reviewing the decision of Judge Rosen.

The appellant relies heavily on *People v. Chapman*, 69 AD.2d 497 which is a rather singular case. The tortured lengths to which Mr. Collins would extend the holding in

Chapman would make it impossible, not virtually impossible but factually impossible, ever to have a defendant waive their right to independent counsel not merely "counsel", even though that person may be appearing for himself before a Grand Jury, Petit Jury or a Court. In Mr. Collins' interpretation of the *Chapman* case he has adopted a position similar to that of a person who murders his mother and father and throws himself on the mercy of the court because he is now an orphan. The facts in *Chapman* bear some review. In the *Chapman* case defendant was represented at arraignment by retained counsel. At the time of his appearance before the Grand Jury it was his attorney's decision not to appear at the Grand Jury and not to have Mr. Chapman testify. However, despite his counsel's advice Mr. Chapman appeared at the Grand Jury stating that he wanted the opportunity to "explain" a few things to the Grand Jury in the expectation that he would not be indicted.

He did not have his personal retained counsel present and after a somewhat shallow inquiry by the court as to whether or not he was aware that waiving immunity and testifying before the Grand Jury was a "very serious matter" the defendant Chapman then proceeded to testify and not surprisingly was indicted. That is hardly the case at bar. Prior to appearing before the Grand Jury Mr. Chapman had been represented by an attorney and counsellor at law who had been retained by him to protect his interests. Throughout the many year history of Mr. Collins' involvement with the law before the City Court Criminal Division in Albany, the County Court and other courts including the Supreme Court of New York State and the Federal District Court Mr. Collins nearly always appeared for himself, apparently because he is the only

attorney he truly trusts. In the *Chapman* case there was no evidence that Chapman ever appeared pro se before *any* court or that he had *any* familiarity with the court system whatsoever. There certainly was no evidence in the *Chapman* case that Chapman was a paralegal. Mr. Collins identified himself before the Grand Jury as a paralegal. Judge Herrick was well aware of Mr. Collins' abilities to represent himself as he had experience with him in a 1995 case which was in Judge Herrick's court involving an act of civil disobedience at the mall complex of state offices in Albany. The arraigning judge in that case was, according to the record, Stephen Herrick and throughout that matter Collins appeared for himself, appeared at a suppression hearing and later at a trial at which time he tried the case in defense of himself resulting in the charges against him being dismissed by Judge E. David Duncan, an associate judge in the criminal division in the City Court of Albany. Mr. Collins' reputation in the City Court Criminal Division was well known and his ability was also recognized to be well known as well. On the record, which Mr. Collins likes to quote, Judge Duncan praised Mr. Collins' pro se work, his talent as a legal advocate and encouraged his continuance of the same.

The courts of this state have universally recognized that where the representation is knowing and intelligent and that the defendant understands what he is undertaking the courts always allow a defendant in a criminal matter to represent himself. Albeit, sometimes they do require that they sit with counsel if there's any doubt in the judge's mind as to whether or not the party appearing before him knows what he is doing or not, but there was no such doubt in Judge Herrick's mind, nor in Judge Rosen's mind nor in any other judge's mind in this area

where they were well acquainted with Mr. Collins and his pro se representations.

After his arraignment in City Court in Albany he was notified, as his own attorney at his Troy address, of all further proceedings and the appearance and the opportunity to testify before the Grand Jury. Mr. Collins did not appear before the Grand Jury without the benefit of counsel. He appeared with the only counsel he trusted over the past 10 years, himself. To read the transcript of Mr. Collins' appearance as is set forth in the appendix before the Grand Jury and to allow this defendant, now claimant, the benefit of hoodwinking the judicial system would be a disgrace. Indeed Mr. Collins had the right to testify before the Grand Jury, a right which the Grand Jury and the District Attorney's office acknowledged after he signed the requisite waiver of immunity. That right is guaranteed to a defendant and Mr. Collins knowing that it was guaranteed to him, took advantage of it. See *Morgan v. Null*, 117 F.Supp. 11 (SDNY, 1953).

It is impossible to imagine that Mr. Collins, when he appeared before the Grand Jury in the dialogue attached to his complaint and set forth in his motion papers could have done more to sustain the burden on him to prove that he was knowingly and intelligently proceeding pro se. Having done so on previous occasions and having satisfied the requirements of other judges, he then *had* to be given the right to testify with the advice of himself as counsel. See *People v. Lattanzio*, 134 Misc.2d 469 (1987) and *People v. Futia*, 113 Misc.2d 651 (1982).

Although the prosecutor limited Mr. Collins in the scope of his testimony so that he could not use the Grand Jury as a bully pulpit from which to make a declaration in

accordance with the principals in *People v. Smith*, 87 N.Y.2d 715 (1996) he certainly had the free and open opportunity to testify and explain whatever he wanted to about his conduct and then invite the Grand Jury to indict him – which they did. Having sustained by a reasonable dialogue his ability, knowledge, understanding and knowing intent to waive his immunity and pursue his right to testify before the Grand Jury, Mr. Collins is ill begotten to come here now and claim that the piece of paper, the waiver of immunity which was acknowledged to be executed by him in the presence of the Clerk of the Grand Jury and the Foreman of the Grand Jury, although now missing, was not [according to the statute] "filed" with the Grand Jury. Such is an absolute relegation of substance to form. See *People v. Degnan*, 246 AD.2d 819 (3rd Dept., 1998) and *People v. Trammel*, 178 Misc.2d 753 (1998).

There can be no suggestion that the conduct of the District Attorney's office and the prosecutorial staff before the Grand Jury was a departure from anything which preceded in this case or in the many prior involvements of Mr. Collins with the criminal justice system. The defendant then, now claimant, had proceeded pro se consistently and had been supported in that by both Judge Duncan and Judge Herrick along with the general acknowledgment of the local judiciary that Mr. Collins appeared pro se. He satisfied both the arraigning court and the adjourning court that he was capable and competent to represent himself and had done so to his own acquittal in the past. Had the District Attorney interfered with his right and denied him the right to testify before the Grand Jury it would be the District Attorney who might have violated Mr. Collins' statutory rights to testify before the Grand Jury and that would be the substance of

his appeal to this court and not the one he is currently pursuing.

This court should note the seriousness and the patience with which Mr. Horn interrogated Mr. Collins warning him of the serious consequences of the waiver and asking him repeatedly if he understood what the waiver meant and that he could be indicted on his own testimony. Mr. Collins not only asked to testify, he begged to be indicted so that somewhere he would have his bully pulpit from which to preach his diatribe against the judicial system of the State of New York. To have turned him away from the Grand Jury under the prior experience and the dialogue which is in the record here would have violated all the standing principals of the right of a defendant to testify before the Grand Jury. See *People v. Smith*, 87 NY.2d 715 (1996).

In a recent case of *People v. Jorge*, 172 Misc.2d 795 (1997) the court there held that when a defendant signs a waiver of immunity from prosecution in derogation of his Fifth Amendment constitutional rights he *must* be permitted to testify before the Grand Jury. There is no evidence that the waiver that was signed by him was either involuntary or induced by any improper means that was exercised over the person of the defendant. Indeed there is no such evidence in the Collins case and the *Jorge* case supports the position of the respondent herein. From the time of his arraignment to the time of his appearance before the Grand Jury Mr. Collins had more than ample time, if he chose, to obtain independent counsel or outside counsel either to represent him or to assist him in this matter. He chose not to for the reasons he stated before the Grand Jury. But now he seeks to have the Grand Jury

proceedings invalidated on what is at best, a gross technicality. Nor, in a reading of the dialogue between Mr. Collins, the D.A. and the Grand Jury is there any indication that at anytime during his proceedings and testimony before the Grand Jury he had any second thoughts about proceeding without counsel. According to Criminal Procedure Law Section 190.52 a section which I am certain Mr. Collins knows better than most practicing attorneys, he had the right to have an attorney present with him as long as the attorney did not interrupt or interfere with the proceedings of the Grand Jury. Mr. Collins at no time suggested that he have one at which time the Grand Jury proceedings would have been suspended for him to avail himself of that opportunity.

The suggestion now that he proceeded at his own peril and thereby vested upon himself transactional immunity having declared before the Grand Jury that he intentionally committed the facts and events upon which the crime is based is a total absurdity. *People v. Diaz*, 211 AD.2d 402 (First Dept., 1995), *appeal denied*, 84 N.Y.2d 972. In the case at bar the object of the investigation *was* the claimant Charles Collins and upon insisting on his right to represent himself and proceed forth to testify before the Grand Jury he had only done before the Grand Jury what he repeatedly had done in the past, time and time again, in various courts throughout this area. It might be noted by this Court that he has appeared before the District Court and before this Court pro se constructing a reasonably formidable set of papers from his experience as a paralegal which obviously he does in each and every instance in which he appears for himself.

For all of the above reasons it appears abundantly clear that the claimant Mr. Collins is once again attempting to manipulate the criminal justice system and/or the Code of Criminal Procedure to place himself in the enviable position of being able to testify with impunity having executed a waiver of immunity. He practically stood on his head to convince the system examining his conduct that he was knowingly, intelligently and capably waiving his right to independent counsel and his right to waive his immunity to testify before the Grand Jury. It is also respectfully submitted that the Court had a reasonable judicial inquiry when he was arraigned before Judge Herrick the day of his incident with the Court of Appeals on January 26, 1998.

This issue of transactional immunity has been submitted to the State Court both in County Court and obliquely by the affirmation of the County Court decision by the Appellate Division. That cleared the way for the trial to go forward in December of 2000 resulting in Collins' conviction. During all those times and with the exception of his advisory counsel at the time of trial [Mr. Lewis B. Oliver] he has represented himself pro se with full knowledge of all the proceedings he was engaged in, the nature and the extent of those proceedings and the legal consequences thereof.

CONCLUSION

THE DISTRICT AND CIRCUIT COURTS CORRECTLY APPLIED THE LAW IN THIS CASE. THE BLIND EYED ADHERENCE BY APPELLANT TO PARSING OF LANGUAGE HAS BEEN AND SHOULD CONTINUE TO BE REJECTED. TO DO OTHERWISE WOULD BE AS JUDGE LARRY ROSEN SAID: "ELEVATE FORM OVER SUBSTANCE." THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Dated: August 21, 2002

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